

Contractually Speaking....

Towards better deals with CONNEX

September 2021

IGF, IPA webinars cover tech and negotiation support

With the pandemic continuing and travel restricted, CONNEX continues to take to the airwaves to raise awareness of themes related to contract negotiation, working with key institutions in the natural resource arena.

In late June, the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) and CONNEX jointly organised a second webinar in which the role of technology was highlighted in the mining sector. *Technology Trends and Implications in Mining Part 2: A Community Relations Perspective*, hosted by CONNEX's Sun-Min Kim, included Isabelle Ramdoo of IGF, Herve Lado of the Natural Resource Governance Institute, Anglo American's Cristina Bruce, and Sustainable Development Strategies Group's Kristi Disney.

Shortly afterwards, CONNEX's Brigitte Klein joined a number of our Advisory Council members for a webinar, which the German Development Institute and the International Trade Centre organized, with CCSI's Karl Sauvant moderating.

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Argentinian Mine Closure – local and national impact

CONNEX-sourced experts support government on largest gold/copper project

While some mines have lasted decades or even centuries, they are eventually retired. The discussion around the closure of mines is usually at least one or more generations away. Not so in Catamarca, a northwestern province. The Bajo de la Alumbrera, which at one time produced approximately 600,000 ounces of gold and 190,000 tonnes of copper annually, is no longer an employer, but has left its environmental mark. All the more reason to responsibly close it.

CONNEX recently supported the negotiation process in mine closure – a first in the country. This is particularly important, as many mines will be closed in the coming years.

In Argentina, mine closure falls under the remit of the provincial government. And very little institutional knowledge exists with regards to mine closure, certainly not on this magnitude. A big question remains the financial guarantees regarding its closure and whether the investor puts up enough financing to close it.

CONNEX-sourced experts visited the mine and carried out extensive consultations with the government to better understand the situation. In addition to presenting environmentally responsible mine closure practices and providing a detailed analysis of the investor's mine closure plan, the experts equally developed a financial model, which served as the basis for negotiation between the investor and the government. Experts also supported the government in the negotiation process itself.

The impact of assisting a responsible mine closure is large, in that it sets the tone for the entire country, raises the bar, and sends signals far and wide. Those signals were heard in Buenos Aires, where the government drew up the country's first piece of legislation on mine closure.

Minister of Mining Dr. Alberto Hensel commented, "Its closure is of great importance for Catamarca and for the

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CONNEX supports mine closure in Argentina, con't.

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country. It allowed the development of its own regulations through Resolution SEM No. 396/2016, which approved a guide for the development of closure plans for the mining industry in the province and provides background for future closures and regulations."

The mine closure discussion is not only on the table in Argentina's legislative chambers, it is also on the agenda for investors. Investors will now have to detail their mine closure concept and ensure that the sufficient amount of human and financial resources, as well as due consideration, is dedicated to mine closure, even though it's usually a generation away.

Dr. Hensel: "Its value is very significant and can be approached from different aspects, one of which is the closure of the infrastructure of the project, of all the facilities that were used in the productive/economic activity such as mining activity. Because the duration of the mining activity is now clarified, we highlight the need to take advantage of this time to develop local and regional economies for the future after closure."

Hensel continued, "The closure process equally allows for the generation of skilled labour in relation to the different processes that are developed, citizen participation so that the



Government and CONNEX experts examine the scope of the mine.

communities in the area of direct influence can see how the environment is being protected and the development of suppliers for issues that did not exist and that a mine closure brings with it. An example would include the creation of nurseries with the ability to regenerate the flora of the site to be subsequently reinserted into the environment (revegetation)."

Series launch "It's just a clause, isn't it?"

Part of CONNEX's goal is to take the stigma and complexity out of contracts, one clause at a time....So, we have just launched the series "It's just a clause, isn't it?", doing just that.

With the tagline of "clauses, contracts and generational impacts", our initial edition, penned by Lou Wells, a CONNEX Advisory Committee member and a Harvard Business School professor for 47 years, analyses a stabilization clause.

Stabilisation clauses are some of the thorniest in the extractive sector and have led to no shortage of billable hours. In the brief analysis, Lou discusses the background to the thinking behind the clause and some of the policy options that governments have in negotiating contracts.

In our second edition, Kristi Disney Bruchner of Sustainable Development Strategies Group frames a community agreement clause and discusses not only the clause, but frankly also how it is implemented. The best clause will mean little if it is not actively monitored.

The series is geared specifically towards governments, however it is approachable enough to draw interest from civil society as well as from university students.

Interested in receiving it? Please let us know (dion@connex-unit.org), specifying English, French or Spanish. And don't forget to tell a friend.

CONNEX bolsters its team's infrastructure

CONNEX continues to bolster its team with the recent addition of John Hauert, who brings his infrastructure expertise to the unit.

Having completed his Doctor of Philosophy in International Investment Law at the University of Cologne, John recently worked for the GIZ project Emerging Markets Sustainable Dialogues (EMSD), which concentrated on peer-to-peer engagement in emerging economies, with an emphasis on sustainable infrastructure. Previous stints include at the OECD Investment Division and briefly at the Columbia Center on Sustainable Investment.

John added, "Having spent the last years with in GIZ working on sustainable infrastructure development, I am very pleased to be joining the CONNEX Support Unit to work with

partner countries on better deals in the extractive industries. CONNEX's work also rekindles my passion for the topic that I developed while researching the legal and policy framework for investments in the extractive industries in Guinea and Liberia as a PhD student."



John brings extensive infrastructure expertise to the team.

Given the increasing importance attached to infrastructure in a Build Back Better world, CONNEX is ready to assist requesting governments with their negotiation support needs in infrastructure.

IGF, IPA webinars (con't), Mine Closure series announced

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The webinar, *Investment facilitation for development: assessing large-scale investment contracts*, brought together an impressive list of countries, predominantly with Investment Promotion Agencies. Brigitte's advice on negotiation support to governments included:

- **Due Diligence on companies / Know the company** – does the company have a policy on following environmental and social standards (and does it)? Does it have enough cash or access to credit for the project?
- **Know your goals** – which is more of a priority, jobs or a signing bonus? Or creating the right legal and policy framework for maximizing local content?
- **Interministerial coordination** – the mining ministry may take the lead, but the justice, environment and finance ministries need to be closely involved, in addition to various levels of government – national, regional and local.
- **High level ownership** – negotiation support is not a "nice to have" or sits on the sidelines. It should play an integral role in supporting the government and thus be owned by senior members of the government. These are experts who have significant international experience – tap into that expertise to get the best deal possible for the country.

Watch this space for more webinars and public events in the contracts space!

OECD Principles on Durable Extractive Contracts Just getting started, needed more than ever...

In the unending stream of policy papers and guidelines was a paper that could literally mean trillions to the world economy in the coming generation – *the OECD Guiding Principles on Durable Extractive Contracts*.

The Guiding Principles (GPs), penned by a leading group of stakeholders from across public, private and multilateral organisations, focus on the sustainability of extractive contracts. Acting as a “how to” and at times a “how to avoid” manual, the GP tackles the technical and the not-so-technical.

CONNEX played an active role in the development of the GPs – Günter Nooke, the German Chancellor’s Personal Representative for Africa, as well as CONNEX’s Advisory Council members Boris Dolgonos, Herbert M’cleod and Lou Wells have all left their mark on its pages.

The GPs lay out eight principles (see next page) with a commentary accompanying each

principle, which delves into more detail. The Guiding Principles are not just a “nice idea”; they come with a very distinct business case. In 2008, a landmark Goldman Sachs study found that 73% of oil and gas projects were delayed because of non-technical risks, so-called “above ground risk” – socio-economic factors, stakeholder pressure and regulatory issues. Those delays accounted for billions of dollars in delayed investment and problematic projects with a definite impact on the bottom line – for all.

In the June edition of *Contractually Speaking*, Karl P. Sauvant, made that point abundantly clear. In 2000, there were 11 cases at the International Centre for Settlement of Investment Disputes in energy and infrastructure. By 2020, that number had increased more than five-fold to 58.

The GPs are currently available in French and English and very soon in Spanish.

https://www.oecd-ilibrary.org/development/guiding-principles-for-durable-extractive-contracts_55c19888-en

Dr. Lahra Liberti, Head of Unit, OECD Policy Dialogue on Natural Resource-based Development answers a few questions about the process of developing the Guiding Principles (GPs).

What was the hardest part about the GPs – the process or the approval?

Definitely the multi-stakeholder process which brought together governments, industry and civil society. Each actor had different and sometimes diverging perspectives. At the process’s beginning, a trust deficit pervaded between stakeholders, which was gradually bridged through an open and transparent dialogue. All participants made genuine efforts to understand motivations and positions and showed continuous commitment to work towards shared solutions.

What is the most crucial aspect to the GPs in your view?

The GPs have not settled on the lowest common denominator, nor do they shy away from difficult questions. Rather, they are forward-looking in character, offering approaches on how to deal with often very contentious issues during the negotiations. These include internalising externalities, with environmental and social costs factored into a contract’s economics; addressing informational asymmetries between the negotiating parties; handling non-fiscal changes in law through mechanisms, without triggering stabilisation clauses and finally possible approaches to shaping predictable fiscal terms.



What has been the uptake, if any, with governments in emerging economies?

We do not have a formal monitoring exercise to verify the uptake of the GPs. However, they are often referred to as a “game changer” during our plenaries and we are aware of one government using the GPs as a framework for renegotiating fiscal terms of a mining licence in West Africa as well as in on-going arbitral proceedings to support a government’s positions.

OECD Guiding Principles - 8 bullets

Below is a summary of the Guiding Principles. Contracts...

- align with the long-term vision and strategy, defined by the host government;
- are anchored in a transparent, constructive long-term commercial relationship and operational partnership between host governments, investors and communities;
- balance the legitimate interests of host governments, investors, and communities, with due account taken, where relevant, of the specific rights of affected indigenous peoples recognised under applicable international and/or national law;
- seek to optimise the value from resource development for all stakeholders, including economic, social and environmental outcomes;
- are negotiated and based on the continued sharing, in good faith, of key financial and technical data to build a common understanding of the performance, main risks and opportunities of the project throughout its life-cycle;
- operate in a sound investment and business climate and should be underpinned by a fair, transparent and clear legal and regulatory framework and enforced in a non-discriminatory manner;
- are consistent with applicable laws, applicable international and regional treaties, and anticipate that host governments may introduce bona fide, non-arbitrary, and non-discriminatory changes in law and applicable regulations, covering non-fiscal regulatory areas to pursue legitimate public interest objectives;
- are underpinned by a fiscal system that is consistent with the governments’ overall economic and fiscal objectives and provides a fair sharing of financial benefits between the investor and the host government, taking into consideration the potential risks, rewards, and country circumstances.

