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Research Report

Strengthening international negotiation assistance for developing host countries

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Strengthening international negotiation assistance for developing host countries

by

Vanessa Tsang*

It is in the interest of host countries, especially developing ones, to ensure that the investment contracts they enter into with foreign investors are fit-for-purpose and effectively protect the parties' often competing commercial interests. Given the scale, value and strategic importance of these projects for developing countries (such as those in extractives and infrastructure), these contracts have far-reaching implications for host countries' revenues and social and economic development for decades to come. Similarly, firms invest billions of dollars in these projects and make long-range financial commitments.

To ensure that these contracts are fair and equitable, a number of host countries may need to rely on international negotiation support. This is all the more important as investor-state dispute settlement (ISDS) increases the risks that countries incur high legal fees and are ordered to compensate investors if they allegedly or *de facto* deviate from contractual terms or breach applicable international legal norms. These costs can be significant: in 2017, for instance, the [P&ID tribunal](#) awarded \$6.6 billion (now worth \$10 billion with interest) to Irish businesspeople against Nigeria for a \$20 million investment; and in 2019, the [ConocoPhillips](#) tribunal awarded \$8.4 billion for the claimants against Venezuela.

When preparing investment contracts for large-scale projects, most MNEs will have highly competent in-house and/or external counsel to represent them in contract negotiations. There is, however, often an inherent inequality of arms in negotiations: many developing countries typically do not have large in-house staff with extensive experience in contract negotiations with foreign investors and have limited budgets to hire experienced advisors. The desired equality of arms and the stability of the contractual regime are often under threat before negotiations have started in earnest.

In such circumstances, international entities provide effective solutions—ranging from pre-negotiation support to direct negotiation assistance—to help redress any imbalance in the context of contract negotiations and to support these countries in entering into the best possible contracts:

- [International Senior Lawyers Project \(ISLP\)](#). Founded in 2000, ISLP assists host developing countries manage extractive resources by procuring, *pro bono*, (mostly senior-level and retired) lawyers to advise on, or get directly involved in, negotiating investment contracts.
- [African Legal Support Facility \(ALSF\)](#). Established in 2008 and hosted by the [African Development Bank](#), ALSF provides funding to African governments to retain top international legal experts from within its international network and to obtain technical assistance in negotiating complex commercial transactions in extractive industries and infrastructure.
- [CONNEX](#). Launched in 2017 by the German government, CONNEX provides global multidisciplinary assistance to developing host countries in all geographic regions that are negotiating complex investment contracts, focusing primarily on the extractive sector.

The direct negotiation support provided by these institutions is undoubtedly important. However, to reach its full potential, a number of actions could be taken to strengthen these efforts:

- The competent authorities in each developing country must be made aware of the existence of the direct negotiation support provided by these three institutions. Modern information technology, including through targeted webinars, makes it easy to mount a systematic outreach effort.
- Negotiation support should be extended to large investment contracts in all sectors (not just in extractive industries and infrastructure), as many of the same considerations concerning fair and equitable contracts apply across different sectors.
- These three institutions should consider partnerships to share their resources and knowledge, thus complementing each other. This would increase their impact.
- More funding is needed to recruit a deep bench of multidisciplinary professionals (at market rates): not only lawyers, but also environmental, financial and industry experts, whose level of experience is comparable to that of the advisors of international investors. Continued reliance on *pro bono* advisors is not sufficient and is rarely available outside the legal profession.
- In addition to seeking funding from developed countries, charitable foundations and high-net-worth individuals should be approached. International organizations (like regional development banks) could be called upon to support these institutions.
- Lastly, each institution should have a fast-track mechanism to provide timely support in response to requests submitted by host countries. While countries will always seek to plan

as far in advance as possible, situations may still arise in which negotiation will need to start within a very short time period, sometimes within a few weeks from receipt of the requests.

Large-scale investment projects have substantial economic and social impact. Developing host countries need to make sure they get the contracts—and contractual protections—they need. For many of them, easily accessible, affordable and specialized international negotiation support is key.

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