SESSION SUMMARY - CONCURRENT 1B

Frameworks for negotiation and agreement making

Fabien Nkot, Senior Advisor, office of the Prime Minister, Republic of Cameroon
Bruce Harvey, Global Practice Leader, Communities and Social Performance Rio Tinto
Rhonda Jacobson, Senior Legal Officer North Queensland Land Council
Jacky Mandelbaum, Lead Law and Policy Researcher, Vale Columbia Center of Sustainable International Investment
Paulo de Sa, Manager Sustainable Energy Department Oil, Gas and Mining unit, World Bank

Mining projects have the capacity to add significant wealth and societal infrastructure to countries, however many lack the capacity to negotiate the most beneficial outcomes for their communities.

One of the key reasons for this is the information asymmetry which exists between governments and the companies they are negotiating with.

According to Paulo de Sa, the World Bank's Manager of Sustainable Energy Department Oil, Gas and Mining unit, building negotiation capacity is crucial. “We believe there are a lot of opportunities for governments to increase internal revenue mobilisation from extractive industries but governments are not always in the best position to make the most of the development. “

The World Bank has a special vehicle for building capacity for negotiation which provides executive and technical assistance for governments, according to de Sa. “And we not alone as the requirement is huge. So for instance the African Development Bank also has a facility.”

The World Bank has developed an internal methodology it calls the extractive industries value chain. “This goes from the very extreme aspects of minerals development, the world of contracts and licenses, to building capacity with government. And of course the issues around transparency also plays an important role.”

But beyond this there is another very important matter to consider, he said. “Once you raise the funds you have to decide what to do with them.”

The World Bank model does not just focus on the legal aspects of negotiation but also considers the financial aspects of negotiation. “Financial models are needed to help governments understand the impacts of what they are negotiating. Environmental and social aspects which are just as important these days," he noted.

Another thing that is frequently overlooked in the negotiation of mining contracts is the ability to leverage infrastructure investment for the development other economic opportunities. "In my opinion that’s the thing that is going to dominate the debates over the next 10 years," he said.

According to Mr de Sa the biggest issues for the sector to consider is balancing the role of legislation to set the basic rules for contracts, while still allowing companies the flexibility to be creative in their approaches to corporate social responsibility. And of course the ongoing issues of disclosure.

Fabien Nkot, Senior Advisor, office of the Prime Minister, from the Republic of Cameroon noted that in several countries mining is not an ordinary business. "I mean this in the sense that when mining projects are well managed they can change the face of those countries and have a significant impact on the society at large."

He gave the example of a convention which the Cameroon Government inked with Australian company Sundance in November 2012 for iron ore development. The first part of this project is worth four billion dollars . "Compare that to the budget of Cameroon which is $5 billion. It goes without saying that such a project will have a significant impact."

But the real issue according to Mr Nkot is that many countries in Africa experience enormous problems implementing mining projects in Africa due to the lack of negotiating expertise.

Cameroon imports skills to overcome this issue. "When negotiating the iron ore project we were assisted by three main advisors; a legal advisor from the US, mining advice from a firm in South Africa, and financial advice from a bank in Morocco. One of the stipulations was that the lead for the financial advice partner needed to come from Cameroon," he explained. "In the end it was a mixture of foreign and local advisors."

Cost however, remains an issue. "Even though we were able to achieve all this, we still have to pay huge fees to international advisors in the negotiation. The goal is to have a local team eventually that can negotiate on its own."

Bruce Harvey, Global Practice Leader, Communities and Social Performance at Rio Tinto said his preferred approach was to talk in terms of agreement building rather than negotiation. Negotiation, he suggested, was a loaded term and tended to involve potential short-term thinking as parties maneuvered for advantage.

Harvey said one of the trends he had seen is that social consent and economic empowerment legislation is becoming the norm. He spoke at length about why it is important for companies like Rio Tinto to be involved in broad-based community development.

"Our primary concern in the long run is societal stability. We are going to be operating the same mines for 20 or 40 or even 60 years. In order to achieve that stability we have to move through generational changes and this is based on broad-based economic development," Mr Harvey said.

He warned that when mines develop as islands of wealth within oceans of poverty serious problems inevitably emerge. "Broad based economic development is the basis for enduring and successful mining projects."

Rhonda Jacobson, Senior Legal Officer North Queensland Land Council, said there is now a dialogue around the process of implementing agreements. Importantly there is an understanding that the process does impact on the quality of outcomes, she said.

“Looking at the foundation of process facilitates and empowers native title holders in those negotiations,” according to Jacobson. “These communities want to envisage the future by developing a business or a community plan. Such a plan allows them to articulate and prioritise their aspirations and to identify resources needed of achieve those aspirations.”

However many mining companies often used the rules of the native title legislation to force the pace of negotiation. This was a mistake, said Jacobson. “The important thing is they must be allowed to develop plan outside of the context of negotiations . They need the space beforehand.”
All too often negotiations are triggered by a native title public notification she said.

Finally, Jacky Mandelbaum, the Lead Law and Policy Researcher at the Vale Columbia Center of Sustainable International Investment spoke about the need to understand the support the resources available for help governments conclude deal.

“There is an asymmetry in the capacity of developing governments and the companies they are negotiating with,” she said. Countries need resources to help them to get to good deal. “And presumably a good and equitable deal for a country is also good for companies as it means stability for the longer term of the agreements.”

“We have looked at what support is needed and what is available and then looked at the gap. We found that support was available but that each of the organisations providing that support was limited in some way .”

Those gaps could be found in any areas but of particular concern where those relating to financial, legal information and equity issues. “And often gaps in expertise on geological data,” she said.

Those skills gaps often compounded problems since tenders to identify external service providers could take months to fulfill prolonging information asymmetry in any negotiations.

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