



THE UNITED REPUBLIC OF TANZANIA THE OFFICE OF THE ATTORNEY GENERAL



STRATEGIC NEGOTIATIONS FOR STATE ATTORNEYS *Bridging Legal Expertise With Business Acumen*

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Rabbi Hillel, circa 70 BC - 10 AD

**That which is Hateful to you, Do
Not Do unto your Fellow! That is
the whole Torah; the Rest is
explanation**



Why Bother?

- **Get the best Deal and Terms**
- **Reduce Risks and Concessions**
- **Growth and Prosperity**



Key Principles of strategic negotiation

*What is Negotiation
all about?*



Negotiations



- ✓ *The term negotiation refers to **Human Interaction** exercise intended resolve an issue in away that both parties acceptable. Negotiations involve give and take, which means one or both parties will need to make some concessions.*
- ✓ *Negotiation can take place between buyers and sellers, employers and employees, two or more governments, entities to entities and other parties.*
- ✓ *It involve two or more parties who come together to reach some end goal that is agreeable to all those involved.*
- ✓ *Negotiation can take as little as a few minutes, or, in more complex cases, much longer **(LNG)**.*

The art of Contract Negotiation



- ❑ *The art of contract negotiation stands as a cornerstone of successful commercial and economic undertakings. It is essentially the ability to effectively negotiate to achieve **Best Terms** and **Good Deal**.*
- ❑ *Negotiations help both parties achieve their **Key Objectives** while also **Minimizing Risks and reducing concessions**.*
- ❑ *Whether you are forging partnerships, securing supply chains, entering into a concession or leasing, establishing service agreements, ability to effectively negotiate can be the difference between thriving and merely surviving or failure.*
- ❑ *In the Business world, contract negotiations are where the bargaining magic happens. You have to be good in making **Good Arguments***
- ❑ *In this presentation I shall try to offer an overview of strategies for effective bargaining, tailored to business navigating the complexities of the legal landscape.*

What Makes a Good Negotiator?



- A good negotiator is a person with the ability to listen, to think under pressure, to clearly articulate their point of view with very good arguments, and willing to compromise, within reasonable domain.
- A person who is passionate about Negotiation
- A person of good emotional intelligence who can manage his or her emotions and those of others (**Inward and Outward Mindset**).
- A person who understands the trend and dynamics of the business involved to carry out **Meaningful Dialogue** with good arguments so as to achieve concessions from the other party.
- Language and Communication Skills



Understanding the Basics of Contract Negotiation



- *Contract negotiations is more than just an exchange of offers and counteroffers. It is a **Human interaction** exercise that requires necessary skills, intensive preparation, good strategies, clear communication, and a **Deep Understanding** of the **Business Goals**, **Technical Aspect** and **Legal Environment**. (Progress Rail/TRC)*
- *The legal framework governing contracts is both rich and complex, making it essential for businesses to grasp the fundamentals before entering negotiations. Apart from key elements such as offer, acceptance, consideration and intention to create legal relationship, you need to understand what other Laws are involved to make any agreement to be legally binding.*

Understanding the Basics of Contract Negotiation



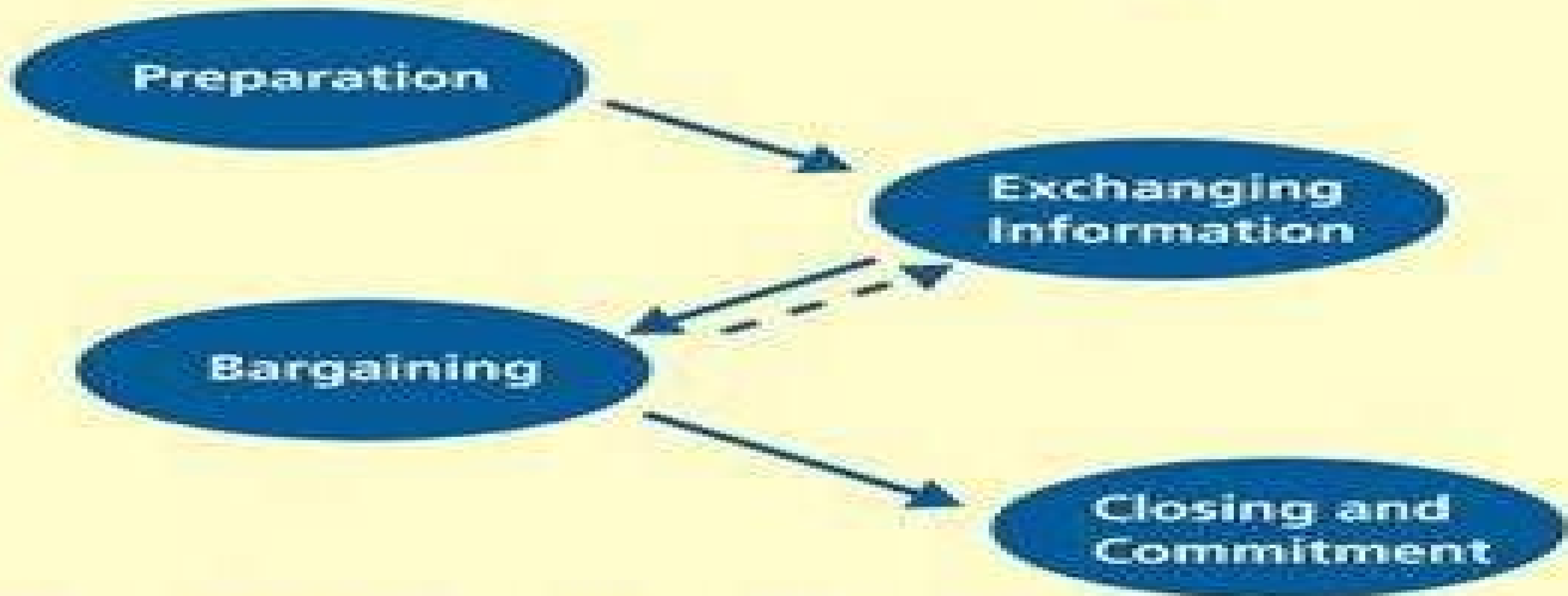
- *Profiling the other party's position in terms of weakness and strength is very important. It will help you to prepare a good negotiation strategy to secure a good deal.*
- *Apart from Legal Issues, understanding of the **market context, business trends, industry standards, financial models, competition landscape and economic dynamics** will provide valuable leverage for your team during negotiations.*
- *Recognizing when to push for more favorable terms and when to concede or tradeoffs while maintaining your strategic goals is very important so that you don't negotiate for years and years without any success.*
- *Negotiation process is underpinned by the principle of Good Faith. Parties are expected to engage honestly and not misrepresent their intentions of the facts.*

Key Principles of Strategic Negotiation



- ❖ *Effective Preparation*
- ❖ *Build Rapport and Trust*
- ❖ *Focus on interests not Position*
- ❖ *Be willing to Make Concessions*
- ❖ *Apply BATNA as a principle of business negotiation which stands for Best Alternative To a Negotiated Agreement. It refers to the next course of action a negotiator may take if a negotiation fails to arrive at a satisfactory conclusion.*
- ❖ *Emotional intelligence*

Four Stages of Negotiation



From Shell, Richard. *Bargaining for Advantage: Negotiation Strategies for Reasonable People* (Penguin 1999)

1. Preparation

Preparation of Negotiations Strategies



- ❑ *Coming to a mutually beneficial agreement is not always easy but if you come to the contract negotiation prepared, you will have a higher probability of obtaining the best Terms and reducing concessions.*
- ❑ *Team composition and their Terms of Reference. It should not be so big but adequate in terms of negotiation skills and qualification in all scope areas that the deal is about. The lead negotiator must have necessary skills to lead negotiations as well as the team (Govt/Puma Energy)*
- ❑ **Strategy Meeting. This is where you are Developing a robust negotiation strategy begins with clear objectives.** You will get this from TOR. You will have to know your minimum and maximum thresholds in all financial and commercial terms. Consultation with your appointing Authority from time to time is necessary to prepare your offer and boundaries including the **variables which you are willing to give away** during negotiation.
- ❑ **Risk assessment** is a critical aspect of preparation. This involves a **Research** to identifying potential legal, financial and operational risks associated with the Contract in question. **(TPA/TICTS 2)**
- ❑ *A strategy should have an action plan with realistic timelines and milestones for negotiations process. This should go along with the preparation of term sheet for your specified targets.*
- ❑ **Assign Tasks** among team members and clarity on who does what including the dos and the donts

Preparation of Negotiation Strategy ...



- *Asses what happens to you if there is no Deal and what happens to them if there is no Deal.*
- *Think about all the questions you need to ask the other side. Then add so more to the fact.*
- *Prepare in advance for the toughest questions they may ask you.*
- *Asses certain things that can make negotiation go wrong.*
- *You may have a separate Technical Committee for the development of Negotiation Strategy which will then be approved and owned by the Negotiation Team. Make sure you get approvals of Negotiation Strategy from the appointing Authority.*

2. Exchange of Information

Exchange of Information



- *Once you are prepared for the negotiation, you are ready to sit down with the other party. If they are smart, they have probably prepared themselves as well. This is the point at which both sides will present their initial positions in terms of what they want and are willing to give in return.*
- *Normally this happens by way of exchange of Draft templates and other information.*
- *Being able to clearly articulate your wishes is critical to the negotiation process. You may not get everything on your wish list, but the other party, if they want to reach a deal, will have a better idea of what it might take to make that happen. You will have a better idea of their position, and where they might be willing to bend, as well.*

3. Bargaining

Three Bargaining Tips



- *Before you start any negotiation get the perspective of the party you are going to negotiate with. This will involve profiling the party, where is he coming from, why does he looking on making a deal in the first place, what is on their mind. How do they need you? Then how do you align their perspective with yours. **Learning and Business Mindset***
- *Always ask for more than what you really want in your Terms. This will give you an opportunity to sacrifice and leverage your objectives. On the land leasing agreement for example, ask for higher rent and if you are negotiating to buy ask for very low price than your target.*
- *Never take the blame for the NO. It is Business bargaining exercise and you prepare your mindset for that. See how you can involve your leaders to crack certain No's **(TPA/TICTS 1)***

Sale Value not Price Principle

Key Issues for Consideration in Bargaining



- *Establish the capacity of the Party (Instrument of Full Power/Power of Attorney)*
- *Start negotiation with discussion on the **Process** before the **Substance**. (Normalizing the Process)*
- *It has been said that whoever makes the first offer loses. I totally disagree. It is all about making Good Arguments.*
- *Never let your offer speak by itself. Always tell the story that goes with it. We are asking for X because of this rationale.*
- *Initial reaction matters a lot (remarks of the lead negotiator). Prepare your opening remarks very well.*
- *Avoid ultimatum unless it is necessary to do so (TCAA/Thales Radar Project)*

Key Issues for Consideration in Bargaining ...



- **Emotional Intelligence** is the most important aspect of business negotiation
- **Active Listening** is one of the most powerful yet often underestimated principles in negotiation. By genuinely listening to the other party, you can understand their needs, concerns and constraints more deeply which can inform your approach and help in finding mutually beneficial solutions.
- Flexibility and Creativity is also important. While you may enter negotiations with clear idea of what you want, being open to alternative solutions that **satisfy your core objective** can lead to more successful outcomes. Effective consultation with appointing Authority is a key. This might involve rethinking the structure of a deal, considering different compensation models or finding innovative ways to address concerns. This would mean knowing **when and what to concede** to move negotiation forward while ensuring that **your key interests are protected**.
- Know when and how to intimidate and when to use provocative language. But this should not come from the Chairman unless you want exercise **Temporary Walk Away** as a strategy to achieve concessions (**TRC/Progress Rail**).



Key Issues for Consideration in Bargaining ...



- ❑ *Know when to Walk Away as a strategy to push for your favourable terms*
- ❑ *Call for break out sessions or adjournments whenever necessary to reassess your position or get certain clarity or consensus among the team members.*
- ❑ *Ensure that you take minutes every day and get the agreed minutes signed. This will avoid parties to denounce what was accepted on a particular day.*
- ❑ *Avoid abusive language and always be professional.*
- ❑ *Building and maintaining a positive relationship with the other party is very crucial. Even in tough negotiations it is necessary that you avoid a situation where a good relationship is broken.*
- ❑ ***Avoid Lies. The most leverage that you have in negotiation is your credibility***
- ❑ ***Your behaviour and discipline matters a lot because it will affects your credibility (BASA with DRC)***

Navigating Common Negotiation Challenges



- ❖ *Negotiation can sometimes reach an impasse, where neither side is willing to budge on certain issues. When faced with such challenges, it is important to keep the lines of communication open and explore the underlying reasons for the deadlock. Often a fresh perspective or a more detailed explanation of your position can help overcome hurdles.*
- ❖ *Another Challenge is dealing with high pressure tactics or unreasonable demands. Be firm not to accept, and stick to your negotiation strategy and objectives. **(BASA with Ethiopia)***
- ❖ *Misunderstandings and miscommunication can occur. These should be resolved by the two parties through reduced side Dialogue teams from both parties on those specific areas.*

Expected Areas of Concerns that may cause Impasse



- ✓ *Unreasonable Technical and Commercial Terms*
- ✓ ***Change in Law Provision (Stabilisation Clause), Written Laws Amendment, Project Law***
- ✓ *Choice of Law*
- ✓ ***Seat of Arbitration***
- ✓ *Land Rights Issues*
- ✓ *Local Content*
- ✓ *Termination Clause*
- ✓ *Expropriation*
- ✓ *Force Majeure*

In all areas of concerns you need to know where and how tradeoff can be applied and how to navigate from stalemate or impasse situation. This is where thorough consultation with Leaders and Attorney General is required to get the deal done without affecting your strategic objectives.

Summary



- ▣ *Understand the Subject*
- ▣ *Prepare*
- ▣ *Discuss the Process*
- ▣ *Win-win*
- ▣ *Sale Value not Price*
- ▣ *Good Arguments*
- ▣ *Secure the Deal*
- ▣ *Get approvals*



Cross-Border Negotiations: Legal and Business Challenges

Cross Border Negotiations

This involve parties from different countries making legal frameworks differences crucial to address to protect the interests of the parties involved. In cross border negotiations you will encounter the following classifications of Agreements:

- ❖ *Memorandum of Understanding (MoU);*
- ❖ *Bilateral Investment Treaties (BIT's) Bilateral Air Services Agreements (BASA) and other Bilaterals;*
- ❖ *Multilateral Agreements;*
- ❖ *Intergovernmental Agreement (IGA);*
- ❖ *Host Government Agreement (HGA); and*
- ❖ *Other Agreements depending on subject matter such as leasing, Deed of Settlement, Concession, Procurement etc.*

Memorandum of Understanding (MoU)



- *This a type of agreement between two (Bilateral) or more (Multilateral) parties. It express a convergence of will between the parties indicating an intended common line of actions.*
- *It is often used either in cases where parties do not imply legal commitment or in situations where the parties cannot create a legally enforceable agreement. This is common in aviation.*
- *Whether MoU constitutes a binding contract depends on the presence or absence of well defined legal elements.*

Bilateral Investment Treaties (BIT)



- *BIT are Treaties concluded between two sovereign States in order to provide for **reciprocal protection of investors** and **create a conducive environment**.*
- *It contains provisions relating to investment protection of nationals of both States for equitable and fair treatment on the areas that the Treaty between the two States will identify.*
- *The main principle of BIT is **reciprocity** while observing **equitable treatment** in all investment undertakings as may be provided in the Treaty itself.*

BASA

Traffic Rights

Designation

Frequency

Intergovernmental Agreement (IGA)



- . *IGA is part of contemporary development of International Law to assist States to conclude agreements for execution of specific development project outside the ambit of the multilateral Agreements or Bilateral Investments Treaties (BIT's)*
- . *IGA can be defined as any agreement that involves or is made between two or more Governments or quasi-governmental entities in Cooperation to **deal with a specific project of mutual concern.***
- . *It is a legally binding Agreement having an impact on the operation or functioning of intended objectives between the States*
- . *Mostly this type of Treaties are applied in energy sector (ECOP Tanzania and Uganda), Construction (Gabsikovo Nagymarov Project), Ports (Tanzania and Emirate of Dubai)*

Key Features of IGA



- ❑ *It is between two or more governments or quasi-governments for a project of a mutual interests*
- ❑ *Aims to achieve specific project objectives to be executed in one of the two Governments*
- ❑ *The other State provides assurance and guarantee to the other State in respect of the intended project*
- ❑ *IGA is different from the Bilateral Investment Treaties (BIT's) since BIT's are generally of reciprocal in nature and aims at providing general assurance of investment climate of two States creating a fair level of treatment between them without a focus on a specific project*
- ❑ *While IGA is not of reciprocal in nature and assurance/guarantee are provided by one State to the other and are focusing on execution of a specific project and not general in nature.*
- ❑ *As a matter of principle IGA shall stipulate specific Parties that will enter into project contract as implementing entities from each party.*

Host Government Agreement



- ❖ *A Host Government Agreement (HGA) is a contract between a foreign investor and a host government outlining the terms, conditions and obligations for specific project, often including provisions to minimize risks for the investor **(East African Crude Oil Pipeline and the Government of URT)***
- ❖ *HGAs often originates from IGA designed to stipulate the rights and obligations of both the foreign investor and the host government **(DP World and the Government of URT)**.*
- ❖ *HGAs typically cover a wide range of issues such as investment terms and conditions, taxation and revenue sharing, environmental regulations, local content, land acquisition, Stabilization Clause, Force Majeure etc.*

*BIT, BASA, IGA, Multilateral Agreements
are governed by International Law of
Treaties. HGA and Other local Agreements
with foreign elements - Lex Loci Contractus*

Vienna Convention on the Law of Treaty, 1969 (VCLT)



- ❖ *Treaties had been one of the major source of International Law. So it was necessary to develop a body of rules that will govern this very important aspect of International Law.*
- ❖ *VCLT was one of the achievements of International Law Commission (ILC). The Law of Treaties was selected by the ILC at its first session in 1949 as being suitable for codification and was given top priority.*
- ❖ *ILC appointed British Lawyers **Sir Hersch Malgosia Lauterpacht, Sir Gerald Gray Fitzmaurice and Sir Claud Humphrey Waldlock** as special Rapporteurs on the subject.*
- ❖ *In 1966 first Draft and 22 May 1969 the conference adopted the VCLT. Enter into Force on 27 January 1980 after 35th ratification as per requirements.*

Vienna Convention on the Law of Treaty, 1969 ...



- ❑ *Vienna Convention on the Law of Treaty **(VCLT)** is a body of rules governing what is a treaty, how it is **made** and brought into force, amended, terminated, and generally operates.*
- ❑ *A Treaty is defined as an International Agreement concluded between States in written form and governed by International Law, whether embodied in a single instruments or in two or more related instruments and whatever its particular designation (Article 2).*
- ❑ ***Since IGA is concluded by two or more States, then by virtue of the above definition and if the parties are contracting States, it is a Treaty. In that regard, its crafting ought to reflect principles enshrined in the Vienna Convention on the Law of Treaty since VCLT can be applied to interpret that intended meaning between States.***
- ❑ *VCLT was Ratified by the United Republic of Tanzania on 12th April, 1976.*

Key Features of the VCLT



- ✓ *A source of International Law*
- ✓ *A treaty on Treaties*
- ✓ *Capacity of the State to conclude a Treaty*
- ✓ *Instruments of Full Powers to negotiate and authenticating the text*
- ✓ *Expression of Consent to be bound by the Treaty (signature, exchange of instruments, Ratification, acceptance, approvals), Accession.*
- ✓ *Pacta Sunt Servanda (Article 26) **(Tanzania and Malawi Case) (Burundi/Tanzania)***
- ✓ *Reservation*
- ✓ *Termination and Denunciation*
- ✓ *Entry into Force*

- ***Prepare***
- ***Understanding of Ius Cogens and Law of Treaties***
- ***Understanding of International Trade and Investment Law***
- ***Exchange Information***
- ***Negotiate***
- ***Finalize***



Leveraging Technology in Strategic Negotiations

Leveraging Technology

- *Leveraging Technology in Strategic negotiation is important. It may involve using tools like data analytics, communication platforms and AI to enhance communication, data analysis and collaboration.*
- *This can lead to more efficient and effective negotiations, ultimately resulting in better outcomes and stronger relationships.*

Negotiation in Public-Private Partnership (PPP)

Negotiation in Public– Private Partnership (PPP) ...

This is a long term contract between a Public Party and a Private Party for the development (or significant upgrade or renovation) and management of a Public Asset (including potentially the management of a related Public Service), in which the private party bears significant risk and management responsibility throughout the life of the contract, provides a significant portion of the finance at its own risk, and remuneration is significantly linked to performance and /or the demand or use of the asset or service so as to align the interest of both parties.

Main Characteristics of PPP

- *Risk Transfer from a Public Party to a Private Party*
- *Access to Capital – Shifting investment responsibilities to a Private Party*
- *Leverage innovation of the private sector*
- *Access to expertise*
- *Efficiency of the Private Sector*
- *Spread out of fiscal commitments*

- ***This is not the case in Traditional Procurement Contract (Government bears all risks, capital and Maintenance – DBFOM)***

Why is Private Sector Interested?

Business

- ❖ *User Charges*
- ❖ *Available Payment*
- ❖ *Mixture of Both*

PPP Models

- *Service Contract*
- *Management Contract*
- *Lease Agreement*
- *Concession Agreement*
- ***BOT, BOO, BOOT, DBFOM***
- *Divestiture*

Comparing Options, Contracts

Option, Type of Contract	Duration	Ownership of Assets	Capital Investment	Commercial Risk
1- Consulting Contract	Short	Public	Public	Public
2- Build-Operate-Transfer	20-30 years	Private → Public	Private	Public
3 – Service contract	Typically less than 2 years	Public	Public	Public
4 – Management Contract	3-5 years	Public	Public	Public
5- Lease	10-15 years	Public	Public	Public & private
6- Concession	25-30 years	Public	Private	Private
7- Divestiture	Permanent (but reversible)	Private	Private	Private

Private Sector Demands on PPP Agreements

Since the risks are transferred from the Government to Private Party including huge capital investment transfer, the private sector will seek to counter balance the huge risk with the following:

- ❖ *Stability of the Legal Framework (Change in Law Clause, Stabilization Clause, Written Laws Amendments or Project Law)*
- ❖ *Extended Force Majeure*
- ❖ *Tax Regime Stability*
- ❖ *Sustainability (Termination, Expropriation)*
- ❖ *Security Stability*

Government interests on PPP Agreements

- ❖ *Legal Framework*
- ❖ *Regulation/Oversight*
- ❖ *Tax*
- ❖ *Revenue*
- ❖ *Local content*
- ❖ *CSR*
- ❖ *Sustainability after project completion (SONGAS, TICTS)*

PPP Project Management Cycle

- ❖ *Project Identification*
- ❖ *Feasibility Study*
- ❖ *PPP Procurement*
- ❖ *Contract Management & Evaluation*

PPP Legal Framework in Tanzania

- ❖ *In Tanzania, PPPs are collaborations between the public sector and private entities to deliver infrastructure and public services leveraging the strengths of both parties.*
- ❖ *The Public-Private Partnership Centre (PPPC) is the central body facilitating these partnerships, overseeing project identification, preparation, procurement and contract management*
- ❖ ***The Public-Private Partnership Act (Cap.103) and its enabling Regulations provide the legal framework for PPP projects.***
- ❖ ***Procurement Law and Sector Legislation***

Post- Negotiation: Legal Follow – Up and Implementation

Post Negotiation: Legal Consideration



- *Once both parties are satisfied with the results, it is time to end negotiations. The next step is Drafting the Contract.*
- *One Team Approach helps a lot*
- *It is crucial to ensure that the Draft contract accurately reflects the Terms discussed and protects your business interests. This involves careful drafting and review of the Draft, paying close attention to the language.*
- *Make sure the Draft is well protected to avoid the other party to temper with the agreed terms.*
- *Be very careful with Conditional Precedents **(British Sure Stream Petroleum/Republic of Malawi)***
- *In the United Republic of Tanzania the contract must meet specific legal requirements to be enforceable. This is provided under Section 10 of The Law of Contract Act, CAP 345*
- *If the other party is public, the contract must be vetted by the Attorney General to be enforceable.*

CLOSING A DEAL



Post- Negotiation...

Once the Contract is signed then implementation of the Agreement and monitoring its operation is paramount. This includes grievance redressal measures required in case of misinterpretation or violation of the terms of the Agreement.

Parties must fulfill their responsibilities after the signing of the Contract



PROFESSIONALISM & EXCELLENCE

THANK YOU!

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