

Guidelines for Negotiating International Agreements for Economic Development

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Introduction

- The essence of governance is development
- Development aims to improve quality of life through political, economic and social development
- Governance and development are mutually reinforcing
- Negotiation of (commercial) agreements is linked to economic development because poorly negotiated agreements stultify development. More importantly they lead to losses rather than anticipated economic development.
- Therefore, there is a strong nexus between negotiation of agreements and attaining the aspiration to develop.
- Poorly negotiated/implemented agreements stultify development
- The negotiation process is therefore important to development

Law and Politics Not Exactly Oil Mixed with Water

- Whereas oil mixed with water do not always blend because the molecules of **oil** are bigger than that of **water** and therefore **do not mix** easily, law and politics are different.
- The environment of negotiation for international agreements (finance, trade, investments, environment, taxation etc.) is a mix of legal and political factors
- **Note:** though the obligations of the parties are established on legal parameters and the reference point between them is always the agreement which is a legal document, yet the influence of politics cannot be dissociated from the outcomes.
- However, politics has never been so pervading that any form of economic or commercial relationship commenced without documentation of the obligations of the parties.

- Negotiators of developing countries often mistakenly assume that beneficial agreements can be concluded mainly by diplomatic, political, compassionate, human rights or other non-legal considerations alone.
- Reality is that outcomes are driven by a combination of these and not one factor.
- Given the fact that the outcome becomes legally binding, it behooves negotiators to prepare themselves for a legal outcome and its implications on development rather than on sentimental considerations.
- The 1989 (not so widely known) **Guidelines for the Negotiation and Drafting of Agreements** developed when Prince Bola Ajibola was Federal Attorney-General.
- The principles canvassed in the document remain relevant today as it was then though the document need updating and will be as part of this project.
- The guidelines recognized the disadvantage of Nigeria when it comes to negotiating with MNCs or other development partners, MDA or foreign government.

Pre-Negotiation Steps

- Pre-Negotiation Steps crucial to ultimate success of the exercise viz.-
- Preliminary meeting of parties key to subject matter
- Determine comparative benefit of project
- Consider project capacity and utilization
- Determine best sources of funding
- Establish availability or otherwise of local capacity
- Compose a competent team not just line officers.
- With infrastructure for virtual meetings
- Know the other party and its needs and negotiators. Open source and through Nigeria's missions abroad
- Factor in cultural sentiments of interest to the other party
- Anticipate if one main agreement will require several subsidiary agreements with other countries to enable the country fulfil its obligations under the main agreement
- Anticipate subtle pressure by orchestrated media reports to force a position
- Etc.

Role of Negotiators especially the Lawyers

- Lawyers must always be included in the negotiation team
- The team must have capacity in the subject matter and be very familiar with international economic law
- Understand the international law governing the issue, the regulatory and legal environment of your country and the regulatory and legal environment of the other party to an extent.
- Once a decision to enter into a legal relationship is taken the team must fully grasp the essence of the agreement;
- Consult with Ministry of Foreign Affairs and Federal Ministry of Justice to confirm if Nigeria is party to any protocols or agreements with any country on the subject
- Consult local stakeholders likely to be affected by the outcome of negotiations e.g. the business community or at the least the sector of focus e.g. oil and gas
- A key consideration must always be deep reflection on potential hindrances to realization of the development objectives of the country
- This presupposes that the country must have development objectives and the team must be very familiar with it.
- Note that these background checks take time and sometimes negotiations seem unable to wait however, a little delay to get the background details will always save the country from embarrassment and future avoidable economic cost.

Conclusion

- Experience shows that developing country negotiators are hampered by
- Poor preparation
- Use of standard format agreements with predictable substantive content and seemingly immutable language
- Technicality of subject (s) and weak grounding in international law compounds the problem.
- Political interference
- Preceding factors account for the pervasive idea of vetting drafts prepared by the other party.

- Clear statutory guidelines on negotiating both local and international agreements are clearly needed in Nigeria.
- This project will come up with a fresh draft for the consideration of the Office of the Attorney-General and government
- Insufficient skilled manpower/irrational movement of skilled staff adds to the problems of African negotiators
- Poor documentation of agreements and other international obligations reduces access to precedents and institutional memory.
- The office of AG of the Federation ought to be official depository for ALL agreements signed by the country and indeed MDAs.
- There ought to be an up-to-date database.
- At the moment there is no mandatory depository obligation of ALL major agreements by MDAs
- Establishment of foreign agreements registry/oversight functions for HAGF and NASS will reduce problems of opacity.