

## Document No. 4

### The Theory and Practice

# Negotiations in Debt and Financial Management

Problems of Negotiators and their Solutions (Grant, Bilateral, and Multilateral Negotiations)



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## INTRODUCTION

In June 1994, the United Nations Institute for Training and Research (UNITAR) conducted a workshop on how to negotiate and draft loan agreements in Addis Ababa, Ethiopia. In attendance were the financial negotiators for fourteen Sub-Saharan African countries. Based on a survey conducted at the workshop, this paper highlights some of the problems African negotiators confront, and presents ideas on how to address these problems by building on the well-researched theory of interest-based negotiation. The foundation for the following is the idea that debt management begins with the decision to enter into negotiations for financial assistance. Therefore the ability of a country to efficiently negotiate the terms of a loan agreement is important because it is these terms which determine the cost to borrow the funds. However, for a variety of reasons, countries often assume they have limited capacity to influence the outcome of financial negotiations. This is a misconception. Once parties are committed to the negotiating process it is the preparation and strategy of negotiation that play a greater role in determining the outcome, as the attractiveness of the alternative of having no negotiated agreement condition each side's commitment to the process. Through adequate preparation and the use of the theory of interest-based negotiation, countries can improve their ability to negotiate fair and just financial arrangements.

This document has been prepared following a UNITAR Sub-Regional Workshop on Negotiation and Drafting of Loan Agreements (held in Addis Ababa, Ethiopia, 20-24 June 1994) which invited 68 debt and finance managers and negotiators from 14 Sub-Saharan African countries. It forms part of UNITAR's training programme in the field of legal aspects of debt and financial management. A special thank you is extended to the debt and financial management programme and especially to Mr. Kris Hinterseer (UNITAR) for compiling this text from a number of sources.

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## **I. PROBLEMS FACED BY BORROWERS WHEN NEGOTIATING**

According to UNITAR's survey of financial negotiators from Sub-Saharan African countries present in the Addis Ababa workshop, effective negotiation tends to be hampered by a triple squeeze. One source of the squeeze results from a combination of inadequate time and resources to prepare for the negotiations. Negotiation teams are generally thrown together at the last minute which means there is inadequate time to gather and analyze the relevant information, develop positions, and consult and coordinate with other government ministries. Moreover, it also means that individuals are unfamiliar with one another which can lead to a combination of indifference, increased willingness to take risks and the pursuit of poorly coordinated and ineffective negotiating strategies. Finally, negotiating teams rarely have access not only to competent individuals capable of dealing with the technical issues, but also to veterans of past negotiations capable of providing continuity and guidance in difficult situations.

A second source of the squeeze results from the desire of donors/lenders to avoid protracted negotiations. In most cases creditors use standard form contracts which they are reluctant to tailor to the needs of various countries and borrowers from Third-World countries, who are normally presented with the most numerous and elaborate clauses may be told that the proposal is non-negotiable. Borrowers generally feel that creditors listen only when creditors can set the terms of negotiation, when creditors can adequately meet their objectives, and when borrowers are willing to compromise their position. This pressure derives from the fact that for creditors standard contracts decrease not only the time and money spent on "unnecessary negotiation," but also the cost of enforcement. Moreover, creditors fear that a concession which tailors the loan to the requirements of a particular country means that in the future a similar concession will have to be granted to all countries in a similar situation. In many developing countries, however, this inflexibility has led to the perception that creditors are exploiting their position in a form of neo-imperialism which aims to gain influence over a country's economy.

A third source of the squeeze results from the desire of domestic governments to avoid protracted negotiations. This desire stems from many causes. At times negotiators confront urgent humanitarian needs to obtain and disperse financial assistance. At other times negotiators are plagued by a feeling of apathy as the weak structure of their country's economy is perceived to translate into a weak negotiating position. Compounding these problems are inadequate incentives to negotiate the best possible deal which can lead to an attitude of indifference among negotiators towards the final arrangements. Moreover, the Mexican default of 1982 and the ensuing contagion effect that saw financial flows significantly curtailed to developing countries has led to the impression that if countries push their concerns too hard, creditors will simply withdraw their offer of assistance. Others point to the dangerous influence of a compradore elite who either through incentives or coercion collaborates with international capital to the detriment of the interests of their own country.

However, these problems should not obscure the need for countries to develop their own effective negotiating capabilities. If a country fails to fully negotiate a loan agreement it may acquire unnecessary carrying costs that can hamper a country's

future economic performance. Unnecessary carrying costs (defined as those costs over and above the most economical terms of a loan agreement that could be negotiated under the given conditions) mean that more resources will have to be diverted to servicing the extra cost of the debt. In turn, this means the economy has a smaller pool of resources on which to draw which translates into slower productivity and economic growth. Not only does this mean that there are less resources available for social spending, but also that taxes have to rise in order to service the additional costs thus leading to a low-growth, high-debt-service trap which can exacerbate social unrest and political tensions.

Moreover, once a country enters into financial difficulty it becomes extremely difficult to extricate itself from these difficulties. Domestically, there is pressure to maintain levels of public spending while simultaneously the rich shift the burden of debt onto the poor through such activities as capital flight. Internationally, the creditors pressure the country to maintain its payments on the assumption that the long-term ability of the country to meet its financial obligations remains unimpaired. Meanwhile, rescheduling inevitably brings the Bretton Woods institutions and structural change conditionalities which place even more constraints on a country's economic autonomy.

In summary, it is clear from the complexity of modern loan negotiation that few debt and finance managers, particularly in countries which have only recently entered the international financial markets, are likely to have all the negotiating resources, skills and know-how that they ideally require. Furthermore, given the access creditors have not only to information, but also to specialists in international law and finance,

"merchant banks and consultancy firms have secured very lucrative contracts to provide this service to debtor countries, a service which they could ill afford. It is therefore an area where ... agencies should increase their technical assistance with a view to building up the financial management capability in developing countries facing debt service difficulties." [1]

If countries are to obtain fair conditions in their financial arrangements, and if they are to decrease their reliance on the services of the developed countries, they will have to acquire and develop their own negotiating skills and abilities.

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[1] Sevigny, David, *The Paris Club: An Inside View*. *The North-South Institute/L'Institut Nord-Sud Ottawa, Ontario, 1990*.

## **AN AFRICAN PERSPECTIVE**

### **PROBLEMS BORROWERS FACE WHEN NEGOTIATING GRANT, BILATERAL, AND MULTILATERAL LOAN AGREEMENTS**

The primary problem in negotiating grants is overcoming the perception that grants represent free money requiring little negotiation. In relation to bilateral and multilateral loan agreements, the problems focus on overcoming the perception of being in a relatively weaker position and being able to effectively negotiate the conditionalities. However, in general the problems can be divided into three groups:

First there are problems caused by the use of similar standard form loan agreements by lenders. These ban clauses which the lenders deem to be non-negotiable which makes convincing the lender to tailor the loan to the specific needs of the situation extremely difficult. Moreover, since borrowers are in a relatively weaker position, and given that there are more countries seeking to borrow money than there are countries seeking to lend money, countries often feel that they have no choice but to accept the terms presented by the lenders without negotiation. This can especially be detrimental if a borrower fails to negotiate the conditionalities and hidden costs in the agreement which significantly increase the costs borne by the borrower. Added to this is the general feeling of distrust towards lender countries arising from a combination of negotiating from a relatively weaker position, and the feeling that lenders may be using the agreement as a means of expanding their own markets and sphere of influence. In general it is felt that lenders tend to listen only when they are happy with the terms of negotiation, when they feel that they can meet their objectives, and when borrowers compromise their position.

Second there are problems caused by the interference of national government in the strategy of the negotiating team. In countries seeking foreign aid the urgent need for money combined with a failure to harmonize the efforts of the immediate situation with the long-term development objectives of the country, a perception of a lack of alternatives, and the feeling of being in a relatively weaker position often means that governments would exert pressure that not only limits the room to compromise, but also precludes extended negotiation. At times those responsible for making the final decision often ignore recommendations to negotiate as their survival depends on the deal being signed expeditiously. In general a feeling of apathy and lack of concern by government officials, exacerbated by domestic economic and monetary policy, precludes effective negotiations.

Third there are problems caused by inadequate preparation. The points to highlight are: problems of inadequate information, poor training in negotiating skills, a lack of technical expertise, and poor coordination not only within the team, but also with other government agencies. The root of most of these problems appears to be that negotiating teams are generally thrown together at the last minute.

## **THE CHALLENGES OF FINANCIAL NEGOTIATIONS**

### **1. What are Some of the Problems Hampering Effective Negotiation?**

- Inadequate time to gather, prepare, and assess relevant information.
- Inadequate time to access resources and technically skilled people.
- Poor coordination with other relevant parties not directly involved in the negotiations.
- Poor coordination among team members as they are put together at the last minute.
- Inflexibility by donors to tailor the loan arrangements to the needs of borrowers.
- The feeling that the donors are exploiting the weak financial position of the borrowers.
- Urgent need by the domestic government for financial assistance.
- Feeling of indifference by negotiators about the final terms of the agreement.
- Feeling of apathy by negotiators because of the weak economic position of the country.
- Perception of a lack of alternatives and excessive competition to obtain assistance.

### **2. What makes it Important to Fully Negotiate All Loan Arrangements?**

- The existence of hidden costs which may significantly increase the cost to carry the debt.
- Increased social unrest and political tension associated with poor economic conditions.
- The possible imposition of conditionalities in cases where a country enters into financial difficulties.

## II. THEORETICAL INTRODUCTION TO NEGOTIATION: WHAT IS NEGOTIATION?

Negotiation is a process involving two or more people of either equal or unequal power meeting to discuss shared and/or opposed interests in relation to a particular area of mutual concern.

As a process, negotiation has three dimensions. First, negotiation is an educational process: it enlightens the other side about your team's concerns, perceptions and aspirations. Second, negotiation is a problem-solving process: inevitably the parties involved have different perspectives that must be reconciled if there is to be progress. Third, negotiation is an interdependent process: workable and sustainable progress depends on building a cooperative relationship with the other side. In general, negotiating a workable balance among competing interests requires a combination of direct and indirect diplomacy, discussion and consultation, compromise and concession, and above all, flexibility.

Moreover, negotiation is about «conflict». In negotiation, conflict tends to be a product of the different interests held by the parties in relation to the area under discussion. The nature of the conflict is conditioned by the substantive, psychological and procedural requirements of both sides: respectively, the minimum objective, emotional needs, and resolution and implementation procedures requiring satisfaction for there to be an agreement. The conflict therefore need not be destructive: it can be used to promote communication and discussion which allows the parties to redefine old, unworkable, or to establish new, relationships. Furthermore, the nature of conflict changes over time which allows new opportunities for discussion and reconciliation. In general it is important to understand the nature of the conflict and to legitimize it in the negotiating process.

Finally, negotiation is about power. Power is the capacity to realize a desired outcome, or to change the stance of another party. Negotiation inevitably involves parties with different capabilities and resources. The ability to utilise these differences in an effective exercise of power will depend on the political, economic and social context surrounding the negotiations. The exercise of power manifests itself in the words and phrases used in the final agreement. It is therefore a contingent phenomenon subject to the particularities of the situation and the abilities of the parties involved to function in the given negotiating environment. As a result, in a contest of wills it is not inevitable that the party with greater resources and influence will always realise its objectives. In general, negotiating a workable solution among competing interests requires an understanding of the power dynamics at work because these will set the parameters in which an agreement will be realised.

### **III. THE INTEREST-BASED STRATEGY: WHAT DOES EFFECTIVE NEGOTIATION INVOLVE?**

#### **A. THE NEGOTIATING STRATEGY**

To accommodate the challenges posed by donors/lenders, and to compensate for the pressure exerted by their domestic governments, the strategy negotiators ought to pursue is that of interest-based negotiation. This strategy is most suited to financial negotiations because of its emphasis on creating a cooperative, problem-solving environment which aims to address as many problems as possible, and simultaneously lays the ground work for future cooperation by emphasising the importance of building trust-based relationships. Following this strategy allows the parties involved to focus on the merits of the problem in order to realise the optimal solution. The following are the four principles which form the foundation of this strategy: separate the people from the problems, focus on interests as opposed to positions, generate a variety of possibilities to guide negotiation, and use objective criteria[1]. These ideas will be developed throughout what follows.

The strategy to which this is contrasted is that of positional bargaining. Individuals usually view the negotiating process as a struggle between two opposing positions the objective of which is to bring the other side to a position more compatible with your own at minimal cost. Hence the positional bargaining strategy of defining a position and maintaining it throughout the negotiations with minimal concession is usually pursued. For financial negotiations, however, this strategy is inappropriate because of its emphasis on struggle instead of cooperation. In positional negotiation, the need to define and commit to a position means that it is difficult to incorporate change; the end result is a solution that tends to split differences as opposed to resolving interests. Overall, this approach becomes a waste of resources, energy and time while minimising the incentive to work together for an improved position for both parties.

The reason it is useful to focus on interests as opposed to positions is that they are easier to reconcile than positions. Positions reflect a desirable situation in which a negotiating team would like to find itself. However, there is more than one process through which a desirable position may be realised. Given that it is interests which reflect the substantive, emotional and procedural requirements of a final position it is interests which form the basis of solutions. It is therefore necessary to identify and legitimise the interests of all parties in the negotiating process. However, identifying interests is often difficult because they tend not to be explicit. To identify the interests of the other side it is useful to ask why to understand their reasoning, and why not, to understand their decision-making process. To accommodate the interests of the other side, write them as they occur to your team, arrange them according to importance, and ask for verification of their importance.

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[1] Fisher, R. and Ury, W., *Getting to Yes*, Arrow Business Books: London, England, 1987.



To facilitate cooperation, it is important to show that you are not only open, but also flexible to their concerns. As a general rule support the other side in strength equal to the vigour with which you attack the problem - be hard on the problem and soft on the people.

### **THE INTEREST-BASED NEGOTIATING STRATEGY**

What are the Principles of the Interest-Based Strategy?

1. Separate the people and emotions from the problems.
2. Focus on the merits of the problem and the interests of the parties.
3. Generate a variety of possible solutions to the problems.
4. Incorporate the use of objective and scientific criteria.
5. Focus on creating a cooperative, problem-solving environment.
6. Attempt to build trust-based relations for future cooperation.

## **B. PREPARING TO NEGOTIATE**

The preparatory phase in a negotiation is one of the most important phases in the entire negotiating process:

"Borrowing in general and sovereign borrowing in particular require considerable preparation before the first contacts with a prospective foreign lender take place. The degree to which such preparation is thorough and effective will determine the outcome of any specific negotiation to a greater extent than the negotiating skills of the individuals involved"[1].

The quality, scale and seriousness of preparation are, therefore, important determinants conditioning the overall negotiation process. Workable solutions require creative and flexible behaviour; however, it is this behaviour that the negotiation process naturally tends to impede. Adequate preparation helps compensate this by placing the negotiator in a better position to listen critically, respond creatively and act decisively. It also reduces risks and allows negotiators to lead rather than merely react to events.

The cornerstone of effective preparation is a thorough brief. The purpose of the brief is to understand the subject under negotiation in general, and the issues in detail. Its completion essentially involves the following:

## **1. Obtain and Analyze All Relevant Information**

The purpose of this is to begin to develop an understanding of what the negotiations will entail. In particular there are three areas in which efforts ought to be concentrated. The first involves providing an overview of the subject under negotiation. The details ought to contain a breakdown of the issues involved, a synopsis of the various positions held by the parties, and an analysis of the supporting evidence. The second involves an analysis of how previous negotiations have proceeded. This ought to detail the outcome, the points of difficulty, their resolution and the implications. The third pertains to understanding how the contemporary economic-political-social environment conditions the process. Such analysis will help to understand how the issues have developed and changed, highlight the areas in which difficulty can be expected, and provide precedents which can be used to guide decisions.

## **2. Establish Your Interests and Define Your Position**

The purpose of this is to develop the capacity to guide events and act on principles as opposed to react to events and succumb to pressure. It is best to begin by using the above information to develop a list of objectives which should then be arranged in magnitude of importance. It may also be useful for the negotiating team to outline its substantive, procedural and psychological requirements. Consultations concerning potential modifications of this position should then proceed at two levels.

First, external consultation should be held with relevant government and non-government parties. Effective sustainable development depends on a coordinated development effort among all relevant parties. A firm understanding of how the negotiation relates to the broader development strategy of the nation is essential to understand how to realise the optimal development strategy. It is therefore important to consult other relevant parties to understand how the upcoming negotiations may either help or hinder their efforts. It is also useful to develop an understanding of your place in the power hierarchy and how this inhibits or enhances your ability to negotiate. By building communication with other relevant parties the negotiating team may be in a better position to challenge the pressure to curtail negotiations prematurely.

Second, internal consultation should be held with the other members of your team. An important part of the preparation process is to establish team consensus on what is and is not negotiable, on the issues to press, and on the tactics to adopt. This essentially involves an informal meeting in a casual environment where members are encouraged to voice their opinions and concerns. A different environment from the formal work environment is therefore useful. From the group a moderator should be appointed. The primary responsibilities of the moderator are to direct and focus the discussion, ensure that no ideas are criticised until the creating process has ended, and to record the ideas (preferably on a board in full view of all participants so that they can keep track of what has been said). A successful session is based on separating the process of inventing and deciding,

"In a complex situation, creative inventing is an absolute necessity. In any negotiation it may open doors and produce a range of potential agreements satisfactory to each side. Therefore, generate many options before selecting among them. Invent first; decide later"[1]

Once a set of ideas has been invented, the next stage is to analyze and criticise these ideas and develop them in greater detail by varying their scope and strength. In the end, much of the ability to negotiate effectively depends on team work. By building communication among members of the team, those involved will have a greater sense of input to the process, will be more likely to trust one another, and will have more incentive to negotiate the best possible outcome.

### 3. Devise Strategies

The purpose of this is to develop procedures that will allow your team to anticipate and guide itself through potential problems. One of the most useful procedures to develop is a fall back position or what Fisher and Ury call a Best Alternative to a Negotiated Agreement (BATNA). Often a fall back position is created simply by establishing a bottom line: the "worst" acceptable outcome. As Fisher and Ury note, however, the danger with a bottom line is that it tends not only to be set too high, but also to be excessively rigid, precluding the ability to incorporate what one learns through the negotiating process. A BATNA, in contrast, acts as a guide against which the progress of the negotiations may be measured. This allows your team to be in a better position to direct the outcome towards a more favourable position, to stimulate creative thinking, and to accommodate the pressure donors/lenders may exert to curtail negotiations.

To establish a BATNA, it is recommended that the team develop a list of possible negotiated outcomes from which the most plausible is to be developed in greater detail. Here the previous consultations will be useful. In developing a BATNA, emphasis ought to be on incorporating principled and objective criteria. To use a BATNA as a guide in negotiations, it is useful to establish a «trip wire» by choosing an alternative that is better than your team's BATNA. Should the negotiations begin to resemble an outcome similar to this alternative your team will be aware that the negotiations are heading in an unfavourable direction. It may then be useful to take a break and reevaluate your team's position. In negotiations, leverage can be created through the willingness to walk away from the discussions. Assuming that the other side is committed to reaching an agreement, the side that walks away on objective and principled criteria will have significant leverage to dictate the terms on which they will restart the process. In negotiation strength comes through the use of principled actions as opposed to superior resources.

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[1] Fisher, R. and Ury, W., *Getting to Yes, Allow Business Books: London, England, 1987.*

#### **4. Establish a Similar Outline for the Other Side**

The purpose of this is to develop insight about the interests of the other side. To understand the constraints their position must accommodate, it is useful to identify in as much detail as possible the other team's concerns and aspirations, the power dynamics in which they operate, and their substantive, procedural and psychological requirements. In general people see solutions as lying along a straight line running from one position to the other where the creativity turns simply on splitting differences. Often one side assumes that the problems of the other are theirs to solve and fear giving any legitimacy to the arguments the other side may advance. It is important to understand, however, that just as your team has legitimate substantive, procedural and psychological concerns so does the other team. By developing insight to why the other side undertakes certain actions, your team will be in a better position to understand their reasoning and accommodate their concerns in a wise and fair solution.

#### **THE INTEREST-BASED STRATEGY AND EFFECTIVE NEGOTIATION PREPARATION**

##### **Objective:**

1. To develop a general understanding of the subject under negotiation;
2. To develop a thorough understanding of the interests of your side and their relation to the negotiations;
3. To undertake adequate preparation to realise these interests.

##### **Method:**

1. Draw on the resources available and brainstorm to develop a brief which is as thorough as possible given the conditions;
2. Consult and coordinate with other relevant parties;
3. Develop BATNAs to help guide your team's negotiation strategy;
4. Repeat this process to understand the interests of the other side.

## **5. Summary**

It is important to establish a borrowing strategy that is consistent with the government's overall development strategy, and to link the borrowing strategy to the particularities of the negotiating environment. The objective is to understand the interplay of conflict and power and to plan for its appearance in the negotiating process. In this way a negotiating team will avoid the dangers associated with responding to events without strategy and be in a better position to direct the outcome of the process.

## **C. THE NEGOTIATION**

The following develops the general framework for conducting financial negotiations.

### **1. Opening the Negotiations and Developing the Agenda**

Poor communication means poor negotiation. Clarity, therefore, ought to be the rule guiding financial negotiations at all times. To help facilitate clarity throughout the negotiating process, it is useful to begin the process by explicitly establishing the rules and procedures that will guide the discussions. These ought to address issues such as the time frame and duration of the discussions, the speaking order, how information will be exchanged between the parties, how administrative matters will be accommodated, and what will be the role of substitutes and committees. This exercise will also provide the opportunity to build habits and standards which help to create a secure and predictable environment, to avoid delays when problems arise, and to resist the unwarranted exertion of pressure.

In opening the formal negotiations it is useful to begin with a statement describing the history of the situation, what one hopes to achieve, and the interests and positions involved. These statements should involve "realism with a touch of optimism". The next step is to develop the agenda: the areas and sequence of discussion, and the specific issues of importance. The purpose is to introduce the subject and to give those involved a general idea of how the negotiations can expect to proceed. Here, it also may be useful to highlight those areas in which your team can expect agreement, concern and difficulty.

### **2. Negotiating the Details**

To have one's interests addressed it is important that your team accommodate the concerns of the other side; active listening and flexibility therefore also ought to govern the negotiations at all times. To facilitate such conduct, it is useful to identify a team leader who is fully empowered to respond to the changing situation as required, and who will not only be listened to, but also understood by the team's superiors. Furthermore, as the discussions proceed it is useful to note the points of consensus and difference, the evidence used, and how the positions change. This will allow the team to chart its progress. It is also useful to ask questions and seek the

relevant advice where confusion or problems arise. Finally, it is important to avoid absolute statements, final positions and artificial deadlines which serve only to entrap people in positions from which it may be costly to extricate themselves.

## **THE INTEREST-BASED STRATEGY IN THE NEGOTIATION PROCESS**

### **A. What Ought A Final Agreement Accomplish?**

Objective: Maximum gain at minimum costs for both sides.

### **B. How is it Possible to Realise this Objective?**

1. Begin the negotiations by outlining the procedures that will be allowed through out the process in order to limit potential misunderstanding and conflict.
2. Open with a statement that clearly communicates your interests: your perceptions, understanding, and concerns in order to communicate how your team arrived at such conclusions.
3. Through out the negotiations listen carefully, ask questions to clarify issues and demonstrate flexibility in order to create a cooperative working environment.
4. Acknowledge, legitimise, and discuss the concerns of the other side, and incorporate their input into the process in order to give them a stake in the outcome of the discussions.
5. To develop a solution, start by building consensus around points of mutual agreement and set aside difficult issues for later discussion

### **C. What Criteria Ought the Final Agreement Meet?**

1. All clauses are negotiated fully.
2. All texts are self-explanatory.
3. All irrelevant language is trimmed away.
4. All scenarios and implications are explored in detail.
5. There are no surprises.

### **3. The Final Agreement.**

At this stage, the objective is to make the final agreement as easy as possible for both sides to accept in order to ensure that it will be enforced and that there will be room for future cooperation. The general formula for a Final agreement is one that incorporates maximum gain for your team's interests at minimal cost to the other side. The agreement therefore ought to be based on objective and scientific criteria independent of the will of both sides: an agreement is more likely to be fair by making the other side bend to the virtue of argument instead of the force of will. For example, there are two ways in which a final agreement may be developed. The first is the agreement-in-principle approach. Here the focus is on identifying broad general parameters of agreement within which a more detailed agreement can be completed. The second is the building-block approach. When a general agreement is not possible, it may be useful to fracture the issues into smaller more manageable units on which agreement may be reached and then arranging these as a foundation on which to build a more comprehensive agreement.

## **IV. REALITIES: WHAT ARE SOME STRATEGIES TO DEAL WITH DIFFICULTIES?**

The following attempts to develop some guidelines on what a negotiating team can do to avoid and overcome difficult situations.

To begin, proper conduct throughout the process can help to overcome many difficult situations. Among the most important skills to cultivate is the ability to think and listen actively. In general, think critically: pay close attention to what is said, ask questions to clarify issues, and analyze and relate both questions and statements to the underlying interests. Asking questions is useful because questions generate answers while statements generate resistance. Another important skill to cultivate is speaking. In general, speak to be understood: speak loudly, clearly and to the point, communicate how you have arrived at your position and why, speak to the other team as equals while sympathising with their interests and treating their concerns as legitimate, look to the future instead of dwelling on the past. It is also useful to try and build personal relations with the other team because the faster both sides become friends, the easier it is to reconcile interests. In general, proper conduct involves demonstrating respect, showing curiosity and emphasising concern.

Another important tactic is to keep the issues and the people separate. As Fisher and Ury note:

"As useful as looking for objective reality can be, it is ultimately the reality as each side sees it that constitutes the problems in a negotiation and opens the way to a solution ... Ultimately, however, conflict lies not in objective reality, but in peoples heads. Truth is simply one more argument - perhaps a good one, perhaps not - for dealing with differences... Facts, even if established, may not solve problems and fears, no matter how unfounded, have to be dealt with".

Humans are creatures of ego and emotion with different backgrounds, beliefs and values. It is therefore easy for misunderstanding and mis-communication to reinforce prejudice and lead to a vicious circle of reaction. An important aspect of effective negotiation therefore involves maintaining open lines of communication with the other parties. Part of this requires an ability to control emotion given that emotions cloud critical thinking. This can be accomplished by refusing to react to emotional attacks, acknowledging the emotions involved as legitimate, and discussing their impact on the negotiation process. Some useful strategies to maintain focus on the merits of the issues are to: think about what your team would do in their situation, clearly communicate your team's perceptions about their position, and to avoid reading your team's fears into the intentions and actions of other parties. Other tactics include: looking for how to act consistently with the perceptions of the other parties, finding ways to involve the other parties early in the process in order to give them a stake in the outcome, asking for advice and giving praise where appropriate, and allowing for face saving gestures by making proposals consistent with their values when possible.



## **RECOMMENDATIONS OF RESOURCE PERSONS AT UNITAR SEMINARS AND WORKSHOPS - A PROACTIVE NEGOTIATION STRATEGY**

- Debt managers must develop active negotiation strategies and not sit back simply receiving propositions of tenders. This is true throughout project and programme cycles, that is from the identification of the project up to an ex post evaluation.
- An interdisciplinary team should comprise macroeconomists, financial analysts, accountants, policy planners, behavioral analysts and lawyers who work together in one state agency, which should not be separated from the normal government functions in order to collect all relevant data of public debt, and develop active strategies. In addition to data collection, the interdisciplinary experts have to make projections on the technical as well as financial absorptive capacities of the borrower. They have to take consciously into account the element of future risks and uncertainty in the borrowing process. Economists have to appraise and try to minimize these risks; financial experts have to try to spread the risks by addressing different lenders and lawyers have to use their professional skill in order to allocate risks equitably among lenders and borrowers, and contractors.
- Only technical staff should be actively present during negotiations, Negotiating strategies, including fall-back positions have to be carefully worked out before negotiations. At the end of negotiations, no final obligation should be spelled out. This is why politicians and members of government should not be present during negotiations. It is highly recommended that negotiating teams report back on return to their respective home countries to these higher authorities in order to find time to reassess the negotiation results and to eventually confirm them on a higher hierarchical level.
- One must always remember that in the negotiation of loan agreements and other financial documents, "persuasive" arguments do win points and change minds and ultimately can change the final form of a document,
- There is scarcely a single line in a loan agreement that is truly sacrosanct. Variations can be found for all of these clauses.
- It is as important to know when to lose a point as it is to know when you must win one in a negotiation.
- As far as bargaining position is concerned, remember that if borrowers have to borrow, lenders have to lend.
- Comprehensive regulations/laws are needed which clearly state what procedures for debt negotiations have to be followed. Mandatory rules prescribing loan agreement negotiating procedures including the participation of lawyers at all levels at the preparation, negotiation and monitoring stage are to be developed.
- Multilateral financial institutions are in the business of lending to developing countries. If developing countries do not borrow from these multilateral financial institutions, then the latter will have a difficult time justifying their existence. In conclusion, developing countries do have some bargaining power.
- Developing countries are usually in a hurry to borrow without knowing enough of the background of the loan agreement. Further, there is pressure from the creditors to sign. This should not be allowed to continue.
- It is important that borrowers realize that they have negotiating room, that they know how to utilize effectively this negotiating room, and that they target this negotiating room to those changes which have an effect on the loan use.

## **STRATEGIES TO ENSURE THAT NEGOTIATIONS PROCEED ON THE MERITS OF THE ISSUES**

What are some of the Strategies that can be Used to Ensure that the Negotiations Proceed on the Merits of the Issues?

1. Think critically.
2. Speak to be understood.
3. Build personal relationships.
4. Separate the People and the Issues.
5. Avoid Positional Bargaining.

It is also important to avoid lapses into positional bargaining. If the other side pushes hard then there will be incentive for your team to push back equally hard; this however is counter-productive. Often identifying the tactic employed is enough to neutralise its effects. The general pattern to expect is one where the other side forcefully asserts their position and then attacks not only your ideas, but also your credibility. To counter the attack, side step the confrontation by refusing to react. Turn the attack to your team's advantage by changing this positional game the other side is attempting to play into an interest-based game. Do this by recasting their attack as an attack on the problem: treat it as one possible option, discuss it, note the principles and interests involved, explore the implications for both sides, bring in objective criteria. It is pointless to waste time and energy by acting on emotion to resist their criticisms. It is more important to respond critically by reworking their attack in light of what is learned and give them a stake in the outcome in order to reach a just solution. If the other side continues its attack then sit back and allow them to let off steam. Silence is a weapon to be used and it can especially make the other side feel uncomfortable if you are using this principle: "Some of the most efficient negotiating you will ever do is when you are not talking".

## **V. CONCLUSION**

For many countries, a significant part of their economic fate will be determined by the financial arrangements they negotiate. Often countries feel financial negotiations are an exercise in futility because they feel that they have no choice, but to accept the conditions they are given. However, if a country develops its negotiating skills this need not be the case. The above demonstrates how countries may approach financial negotiations. Through adequate preparation and the interest-based strategy, developing countries can exert significant leverage over the negotiation process. Developing such capacity places yet another demand on the scarce resources available for a country's development. However, given that efficient financial management begins with negotiations for financial assistance such an investment will help to reduce the diversion of resources necessary to carry the debt. Effective negotiating capacity will therefore help countries to master their own fate.

In loan and supply negotiations, lenders and suppliers to developing countries have an edge on borrowers because (i) either the latter are in a hurry to conclude agreements, (ii) or the latter do not have all the necessary skills, in particular legal skills available on their teams, (iii) or negotiations are conducted on the borrower's side at too senior

a level, thus depriving the borrower of a fall-back position in case it wishes to review the terms of the agreements and to modify them after the negotiation but before the signature. Lawyers must be associated with the negotiation of loans and supplies from start to finish, even though there may be no lawyer on the lenders' and suppliers' side.

Lawyers on the side of the latter may not be necessary because these impose contract provisions which their lawyers have drafted and approved once and for all and which lenders claim are standard general clauses not subject to amendment.

As a conclusion, it is worthwhile to bring forward some points mentioned by participants at UNITAR's Sub-Regional Workshop on Negotiation and Drafting of Loan Agreements (Addis Ababa, 20 to 24 June 1994). They are stated as follows:

- in pursuing negotiations it is important to maintain a flexible posture, a willingness to listen and a willingness to pursue a range of alternatives;
- proper pre-negotiation preparation is essential to pursuing successful negotiation, however, this is generally not feasible given that most negotiating teams are thrown together on short notice. This leaves inadequate time to gather and analyze information, to coordinate efforts with other relevant government agencies and to recruit competent professionals able to deal with the increasing technical nature of financial negotiations;
- many governments are unwilling to pursue protracted negotiations for a combination of reasons, including the feeling that they are in a relatively weaker position and therefore lack bargaining power, indifference to obtaining the best possible deal, the need to urgently obtain funding, and a lack of perceived alternatives given the competition to obtain funding; and
- there is a general feeling of distrust towards donors in terms of their use of standard forms which they are generally unwilling to re-negotiate, and the perception that many donors are merely seeking to expand their sphere of influence without regard to the needs of the borrowing country.

## **UNITAR'S ADDIS ABABA WORKSHOP ON NEGOTIATING AND DRAFTING OF LOAN AGREEMENTS**

What Were the Recommendations of the Participants for Creating an Effective Negotiating Environment?

### **A. Preparing to Negotiate**

- Try to obtain as much information as possible.
- Consult relevant experts and parties during preparation.
- Attempt to include technical experts on the negotiation team.
- Establish team consensus and clearly define what is and is not negotiable.

### **B. Conduct During the Negotiations**

- Maintain a posture of flexibility.
- Maintain open lines of communication.
- Seek to create a friendly and cooperative environment.
- Demonstrate your team understands and acknowledges the other team's concerns.
- Demonstrate how the other side's position affects your interests.
- If difficult situations arise, let the other side let off steam and take a break.
- Be willing to explore a range of alternative possible outcomes.
- Be as conciliatory as possible without compromising your position.

### **C. Drafting the Final Agreement**

- Do not be intimidated by donors.
- Ignore inflexibility: negotiate as much as possible given the circumstances.
- Understand that there is always room to negotiate despite inflexibility.
- Resist as much as possible the pressure to curtail negotiations prematurely.
- Abandon positions, if required, to build consensus around points of mutual interest.
- Thoroughly scrutinize the draft agreement to ensure there are no surprises.

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## About UNITAR

UNITAR is an autonomous body within the United Nations which was established in 1965 to enhance the effectiveness of the UN through appropriate training and research. UNITAR's programmes in the legal aspects of debt, financial management and negotiation are among a wide range of training activities in the field of social and economic development and international affairs carried out, generally, at the request of governments, multilateral organizations, and development cooperation agencies. UNITAR also carries out results-oriented research, in particular research on and for training, and develops pedagogical materials including distance learning training packages.

UNITAR's **Training and Capacity Building Programmes in the Legal Aspects of Debt, Financial Management and Negotiation** are conducted for the benefit of over 35 partner countries mainly from sub-Saharan Africa and Vietnam. These programmes aim at meeting the priority training needs of senior and middle-level government officials through a wide range of seminars, workshops, and training of trainers workshops. In parallel to training activities, the programme also assists in strengthening local capacities of governmental and academic institutions through distance learning training packages, up-to-date publications as well as networking activities.

During 2001, the programme will focus on:

- Training government officials through short-duration regional seminars and workshops on various aspects of debt, financial management and negotiation;
- Developing On-line Training Courses (in parallel with its traditional regional training) with a view to tapping a wider audience and reducing cost of training per participant;
- Strengthening existing ties with regional training centres and offering joint courses with partners in the field;
- Creating awareness among senior government officials of the importance of the legal aspects in the borrowing process and of putting together a multidisciplinary team for loan management and public administration;
- Providing in-depth training and skills development for accountants, economists, financial experts and lawyers coming from government ministries and departments involved in negotiation, financial management and public administration; and
- Developing and disseminating training packages and 'best practice' materials directly related to the practicalities of legal aspects of debt and financial management, with a view to strengthening existing human resources and institutional capacities at the national level.

A description of UNITAR's latest activities and training programmes in the area of debt and financial management is available on its website at: [www.unitar.org/dfm](http://www.unitar.org/dfm).

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