ABOUT THE AFRICAN NATURAL RESOURCES CENTER (ANRC)

The African Natural Resources Center (ANRC) is a capacity building entity of the African Development Bank (Bank). ANRC delivers capacity building programs to governments in natural resources management. The work covers both renewable (water, forestry, land and fishery) and non-renewable (oil, gas and minerals) resources. The mandate of ANRC is to assist African governments maximize development outcomes derived from Africa’s natural resources by boosting the capacity of the governments to achieve inclusive and sustained growth from natural resources.

In the context of the Bank’s High 5 priorities, ANRC’s focus is on three main work streams. ANRC deepens Bank staff’s knowledge of extractives through analytics, internal seminars and a knowledge portal. ANRC provides information on natural resources policies, markets, value chains and governance. It supports African countries in creating an enabling environment by strengthening regulatory capacity and advocating policies that achieve positive development outcomes.
“Through the Bank’s African Legal Facility and the African Natural Resources Center, we strengthen the capacities of countries to negotiate contracts and royalties.”

President Akinwumi Adesina
FOREWORD

To regulate and make the right decisions for investing in and negotiating natural resources project agreements, governments of resources-rich countries require skills and knowledge from credible sources. Admittedly, support is available from many institutions. What is often missing, however, are practical information and knowledge tools that enable governments to make informed decisions and investment choices.

The African Development Bank’s (Bank) African Natural Resources Center (ANRC) is taking a pragmatic approach to filling the gap with a bias towards solutions that apply across different natural resources. By designing policy tools that are adaptable across sectors, ANRC is able to address the characteristics of a specific sector and meet the needs of individual countries. The goal is institutionalized knowledge that enables policymakers to leverage a common set of guidelines to tackle diverse challenges and opportunities.

In ANRC, knowledge-based capacity building is an evolving process because institutions change and individuals leave or simply transfer from one role to another. Hence, it is important to institutionalize knowledge and expertise to ensure continuity. This can be achieved through the following:

- Assigning roles on an ex-officio and not individual basis,
- Standardizing the structure of teams,
- Designing a system for knowledge management and peer learning,
- Making a strategic decision on the type of skills to house in state institutions and those to outsource.

The ANRC’s “Negotiations Capacity Building Support Training Program” is a specific response to the need to strengthen the ability of negotiators. The initial focus of the program is on extractives. It has three distinct parts. The first is an advocacy tool to promote good governance and encourage governments to adopt a structured and disciplined approach to conducting negotiations with investors. The second focuses on the principles for negotiating, skills for developing a strategy, processes for conducting negotiations, systems for contracts enforcement and management. The first two parts are applicable and adaptable to all sectors and particularly extractives.

The third aspect, however, is sector-specific and enables policymakers to delve into market and project-related factors. This means that the content and capacity building materials for the third part are unique to the sector from which the participants in the advocacy and training program are selected. This not only ensures relevance but also facilitates practical application. Because the development stages and capacity building needs of countries vary, the ANRC uses the tool in line with each country’s requirements.

Other policy tools that are currently being developed by ANRC include:

- A step-by-step guide for designing and implementing local content policies,
- A land governance tool,
- A gender mainstreaming tool for extractives policies,
- A revenue management policy tool,
- Simplified guidelines for compliance with EU Anti-Illlegal, Unreported and Unregulated (IUU) fishing regulations.

As part of the ANRC’s core business of capacity building, the knowledge will be disseminated through different channels. To promote good governance, the ANRC will conduct advocacy seminars. To impart technical skills, the tool will be translated into a set of comprehensive modules for delivering formal training on the second and third parts. As with other ANRC policy tools, this program
will be the primary vehicle to provide capacity building support in partnership with other Bank departments and regional offices.

I developed the concept that served as the theoretical basis for this tool. Its development would not have been possible without the tireless work of several members of the ANRC team. Namely, Senior Consultant, Dr. Muzong Kodi, Principal Domestic Linkages Officer, Thomas Viot and Junior Consultant Mehdi Khouili. I am equally grateful for contributions from consultants and colleagues at the African Legal Support Facility (ALSF) and the African Development Institute (EADI).

Sheila Khama
Director, African Natural Resources Center

1. PREFACE

The ability of governments of resource-rich countries to effectively steward the exploitation of natural resources wealth is predicated upon a number of factors. One of these is the ability to represent the interests of current and future generations in negotiations with private investors and regional partners involved in cross-border natural resources projects. In response, the ANRC has created a tool to help governments systematically prepare for and conduct negotiations. The “Negotiations Capacity Building Support and Training Program” outlines the scope of support, which includes advocacy and a training course to guide decisions on mandates, team selection, strategy, tactics, project economics, markets and contract management.

Many organizations support governments in strengthening negotiation skills. However, many of these initiatives are deficient in three very important ways. First, they equate negotiation with legal skills and assume that the knowledge is limited to the legal profession. Second, in many instances, training tends to be shallow, adopting a high-level approach lasting only for a few days. However, at best, this approach provides an overall appreciation of the issues involved in negotiations but is inadequate because to negotiate complex long-term agreements more breadth and depth are necessary. Similarly, many initiatives for negotiation skills capacity building omit the important matter of sector and market knowhow. Yet, it is precisely the environment in which natural resources projects are developed that defines risk, rewards and overall external conditions in which the negotiation occurs. In recognition of this gap, ANRC’s tool adopts a more holistic and integrated approach. The approach addresses issues that resonate across sectors relating to strategizing and conducting negotiations effectively.
2. ANRC’S NEGOTIATIONS CAPACITY BUILDING TOOL

Consistent with the Bank’s High 5s, the Center’s strategy is anchored upon two pillars, namely integrated resource development and good governance of natural resources. This tool is part of ANRC’s support for negotiations capacity building, under the “good governance strategic pillar.

Diagram 1 ANRC strategic pillars

<table>
<thead>
<tr>
<th>INTEGRATED RESOURCE DEVELOPMENT</th>
<th>GOOD GOVERNANCE OF NATURAL RESOURCES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Resources planning</td>
<td>Transparency and public participation</td>
</tr>
<tr>
<td>Resources conservation</td>
<td>Negotiations</td>
</tr>
<tr>
<td></td>
<td>Local content</td>
</tr>
</tbody>
</table>

The tool has been developed and will be used in collaboration with two entities of the Bank. These are the African Legal Support Facility (ALSF) whose core business is to provide legal expertise and contract management capabilities and the African Development Institute (EADI) whose core business is capacity building across the board. The ALSF will provide financial support and content for the legal aspects of the training course while the EADI will assist in identifying training partners.
The ANRC tool assumes a generic structured negotiations governance framework as illustrated under diagram 2 below:

**Diagram 2** Overview of the negotiations framework

<table>
<thead>
<tr>
<th>Component</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>NATIONAL VISION</td>
<td>Defines end-state vision to guide national policies, laws and institutional structures.</td>
</tr>
<tr>
<td>POLICY</td>
<td>Identifies choices, trade-offs and provides direction to frame negotiation outcomes.</td>
</tr>
<tr>
<td>LAW</td>
<td>Provides legal instruments to regulate investor activity, legitimize, enforce, negotiate arrangements and resolve conflict.</td>
</tr>
<tr>
<td>INSTITUTION</td>
<td>Avails administrative structures to enforce laws, implement policies, define roles and responsibilities during and post negotiations contract management stage.</td>
</tr>
<tr>
<td>INDUSTRY STRUCTURE, FINANCIAL + COMMODITY MARKETS, INVESTOR STRATEGY &amp; PROJECT ECONOMICS</td>
<td>Contextualizes the project in relation to the global industry, commodity and financial markets and lays the foundation for knowledge based negotiations strategies.</td>
</tr>
<tr>
<td>NEGOTIATION STRATEGY</td>
<td>Articulates negotiator’s mandate, strategic positioning, tactical pathway, expected deliverables and empowers negotiators.</td>
</tr>
<tr>
<td>TEAM STRUCTURE AND ROLE</td>
<td>Guides selection of a team, clarifies authorizing environment and roles for individual members for team effectiveness.</td>
</tr>
<tr>
<td>CONTRACTS MANAGEMENT</td>
<td>Distills outcomes into clear legally binding rights and obligations, permits implementation of agreements and reduces risk of litigation and default.</td>
</tr>
</tbody>
</table>
3. ADVOCACY PROCESS

As stated in the foreword, an important aspect of the tool is advocacy to increase awareness and promote governance through role clarity, separation of powers and a clear strategic direction for conducting the negotiations. The target audience is the national executive and ministers responsible for delegating and defining the mandate for negotiation teams. In addition to role clarity, managing public expectations is a critical success factor and a vehicle for good governance. This is an important consideration because even if state institutions diligently undertake the necessary actions, success will be short-lived and diminished by negative public perception if outcomes do not align with public expectations. To guard against this risk, governments need to consider taking the following steps:

- Implementing a pre-negotiation communication process to inform key stakeholders,
- Maintaining regular communication throughout the long period of negotiations,
- Achieving consensus between political parties on key desired outcomes to avoid polarization,
- Containing unrealistic public expectations,
- Articulating a common public narrative by governments, other agents of the public and investors.

Objectives
The first objective is to advocate for good governance as it relates to team selection, determining the mandate and implementing contracts through a clearly understood process. A second important objective is to stabilize the authorizing environment in which the negotiations and implementation of the agreements occur.

Expected Outcomes
The desired outcomes are a clear mandate, an empowered team of negotiators, clear lines of authority and policy, legal and institutional parameters to stabilize the environment for negotiating and implementing agreements.

Target Group
The advocacy part of the program targets the executive arm of governments as the entity responsible for selecting, mandating negotiators and designing regulatory structures. As custodians of resource wealth, the Executive is guided in evaluating strategic options, developing a clear mandate and overseeing the performance of negotiation teams through principles of good governance.
4. OUTLINE OF THE TRAINING COURSE

The training course has three main modules that can be administered individually to bridge specific capacity gaps in line with identifiable skills needs. However, the course also can be one comprehensive training session made of all parts of the tool. Used comprehensively, the tool has three main phases, namely the pre-negotiation, negotiation and post-negotiation phases, as described under section 4.1 below.

Objective
The objective is to strengthen the knowledge of negotiators by administering a comprehensive training course on pre-negotiations considerations, developing negotiation strategies, conducting the negotiations and managing contracts. The training course also covers aspects of a specific sector depending upon the profile and skills needs of the course participants.

Expected outcomes
The main expected outcome is the capacity of government teams to develop and execute a clear strategy for negotiating and securing fair contracts and stable agreements for the exploitation of natural resources. A second important outcome is institutional knowledge and long-term capacity to negotiate mutually beneficial outcomes with investors.

Target group
The training course targets representatives of governments delegated to negotiate with investors or bilateral partners.

4.1. PHASE I: PRE-NEGOTIATION PREPARATIONS
The pre-negotiation phase will ensure clarity of purpose at the most senior level of the national leadership hierarchy as well as guide the selection of the negotiation team. It is intended to ensure team preparedness for developing a strategy, aligning roles and mobilizing resources, if need be. The modules for Phase I are described below:

4.1.1. TRAINING MODULE I
Mandating negotiations teams
Determining the mandate and choosing the negotiation team are the preserve of a national executive. To achieve this, the State needs to have a clear sense of direction and purpose to guide the negotiation process and compose a competent team. Apart from guiding the limits of the team’s bargaining authority, a mandate serves as a source of discipline for the negotiators and a basis for assessing team performance. A mandate limits powers of discretion and strengthens governance. It also manages the expectations of those who empower the team.

A negotiation mandate, by definition, lays out a set of pre-determined deliverables that, if achieved, protect the State’s interests. By nature, the deliverables are a combination of “negotiables” and “non-negotiables”. In addition to those matters that are stipulated in law, non-negotiables tend to focus on extracting direct, immediately verifiable value that would undermine the economic value and the position of governments if not realized. Non-negotiables may also be a function of existing agreements already entered into in relation to other aspects of a project. Others may include bilateral treaties that preclude deviation from pre-agreed trade agreements.

Negotiables, on the other hand, represent those deliverables that, while enhancing the core value of the deliverables, would neither erode the economic value of the benefits gained nor the strategic position of governments if not secured. Prior to commencing negotiations therefore, it is essential for governments to:

- Define what and why a deliverable is “non-negotiable” or “negotiable”,...
• Identify any issues that constitute “a condition precedent”,
• Agree what constitutes a potential deal-breaker and why,
• Decide on its fallback position in case of a deal-breaker,
• Determine tactical ways to get negotiations back on track in case of an impasse (e.g. by finding a mutually trusted facilitator to break the deadlock).

Such overarching rules of engagement enable negotiation teams to draft a “principle position” statement for governments to use as a blueprint for guiding negotiations.

**Possible role of different public institutions in negotiations**

For negotiation teams to be effective, governments need to clearly define individual roles at institutional and individual team member levels. This helps manage intrateam relationships, clarify communication channels and reduce peer rivalry. Diagram 3 below illustrates possible roles and responsibilities of different state institutions based on decision-making hierarchy as it relates to negotiations.

There is no generic model for defining roles. What is important is to transparently define and assign roles. However, typically the Executive should not be involved in day-to-day negotiations. It should rather give a mandate and retain the right to approve the final agreement.

The role of the National Assembly should be defined to ensure the separation of powers from those of the Executive.

**Diagram 3 Possible institutional responsibilities for managing negotiations**

<table>
<thead>
<tr>
<th>EXECUTIVE</th>
<th>NATIONAL ASSEMBLY</th>
<th>ADMINISTRATIVE ARM</th>
<th>PARLIAMENT / CSOs</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Determines mandate</td>
<td>- Oversees implementation</td>
<td>- Nominates negotiating teams</td>
<td>- Reviews</td>
</tr>
<tr>
<td>- Approves recommendation of negotiators</td>
<td>- Enacts legislation</td>
<td>- Implements and enforces agreements</td>
<td>- Advises</td>
</tr>
<tr>
<td>- Audits processes</td>
<td>- Nominees non-executive directors to state-owned corporations and joint ventures</td>
<td>- Nominates negotiating teams</td>
<td>- Advocates</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Enforces laws</td>
<td>- Validates</td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Manages commercial interests</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>- Regulates</td>
<td></td>
</tr>
</tbody>
</table>

**OUTCOMES OF CLEARLY DEFINED ROLES AND RESPONSIBILITIES**

| - Role clarity |
| - Clear reporting structure for negotiators |
| - Separation of powers |
| - Inclusive decisions |
| - Clear authorizing environment |
| - Stable investment climate |
| - Stable agreements |
Selecting negotiators

There are several factors to consider when preparing to select a team, including:

- Criteria for selecting members of the negotiation team,
- Importance and modalities for assessing team capacity,
- Need for balancing government officials with external technical experts in the sector,
- Ways to achieve role clarity between technical experts and government officials,
- Criteria for selecting and defining the role of a team leader,
- Ways to ensure role clarity between the team leader and members,
- Ways to separate the role of national resources companies from regulatory agencies,
- Guidelines for determining the basis for appointing ex-officio members from those appointed because of a unique skill.

This process ensures that the correct authorizing environment exists to facilitate a structured and effective process for conducting and overseeing the negotiations. It highlights the importance of having an arm of the State to mandate, appoint and oversee the work of national negotiation teams as a separate unit from those who negotiate.

4.1.2. TRAINING MODULE II: PREPARING TEAMS FOR NEGOTIATIONS

Target audience

This module targets negotiation teams. The content and overall frame of reference pertains to teams negotiating minerals, oil and gas contracts. The module covers the following issues:

Basics of negotiations

- Principles of negotiations,
- Processes for conducting negotiations,
- Steps for preparing to negotiate (training, information gathering, team alignment, etc.),
- Guidelines for formulating a negotiation strategy (how to position the team in relation to its mandate and counterparts),
- Modalities for developing a negotiation strategy (generating strategic options based on long- and short-term development needs, determining if the country needs revenue, jobs, infrastructure, equity participation vs production sharing options, exclusion of State participation (i.e. does the State want production sharing, equity participation or a wholly-owned state corporation),
- Investment decisions (where in the value chain does the State want to invest? Does the State want to
invest through cash pay-out or carried interest? What is the State’s risk appetite?),

- Strategic positioning (i.e. does the country see itself as a national, regional or global player?),
- Types of partnership (i.e. what forms of partnerships, if any, does the State desire and why?),
- Implementing a negotiation strategy (role clarity, the process, sequencing, managing tensions, dealing with non-negotiables, managing deal breakers, protecting confidentiality, reporting, etc.),
- Understanding the other party’s position (What do they want? What is stated and unstated but important? How far can the State push? What is the power structure? What is the corporate strategy? What leverage does the company have in negotiating with financiers, suppliers and buyers? What are the company’s global and regional footprint, market and strategic position?)
- Understanding the State’s position relative to other parties (How important is the project to the investor? What is the project’s strategic value to the investor? How is it positioned in the cost curve? What other projects is the national project competing with in the investor’s portfolio? How will the State factor this into its strategy?),
- Choosing the State’s preferred business partners (guiding principles, types of partnership agreements, and pros and cons between joint ventures, production sharing agreements, public private partnerships).
4.2. PHASE II: NEGOTIATIONS

4.2.1. TRAINING MODULE I: CONDUCTING NEGOTIATIONS

It is meant to impart useful knowledge on practical and tactical issues for conducting negotiations. Like the modules for the pre-negotiation phase, this module is delivered to participants from all the three sectors, namely minerals, oil and gas. It covers the following:

Tactical issues
- The timing of negotiations,
- The choice of venue,
- The availability of a structured communication plan,
- A jointly agreed public narrative to manage expectations and protect confidentiality,
- Process flexibility to allow for strategic adjustments, tactical reconfigurations, internal consultations and other matters.

Practical issues
- Negotiation process outline,
- Periodic process reviews,
- Agenda and procedural matters,
- Notation of conclusions at important intervals,
- Mutually accepted records of the discussions,
- Periodic review of records by legal teams,
- Validation of minutes of discussions,
- A joint communication plan.

4.2.2. TRAINING MODULE II: MINERALS, GAS AND OIL SECTOR FOCUS ISSUES

This module is delivered separately to practitioners from the three sectors, namely minerals, oil and gas. It is intended to provide comprehensive knowledge of project, options for financing, global production, distribution channels, market structure, sector value chains and types of agreements common to each sector. It is intended to contextualize the theoretical aspects under Module II and address practical matters in respect to a specific sector. It covers the following:

- The resource value chain and matters that impact negotiations (e.g. the generic structure, sources and drivers of value, typical risks and rewards at different stages, the relative level of investment at the different stages),
- Global industry trends to ensure that the negotiation strategy is cognizant of current norms (e.g. traditional and emerging sources of project finance, barriers to entry, traditional and emerging markets, patterns of price volatility, supply chains networks, consumer trends),
- Profile of main industry players to position the investors and country in relation to industry leaders (e.g. profiles and behaviours of leaders,
and followers, drivers of investment decisions and competitiveness),

- Global market structure to contextualize project dynamics and the economics of the resource (e.g. market structure, supply and demand leaders, commodity price structure, tariffs, product pricing models, long-term market outlook, potential product substitutes),

- Understanding the project profile (e.g. significance of bankable feasibility studies, the economics of the specific project, such as the geology of the deposit, cost curve, economic viability, engineering design, expected rate of return, market and financial resilience, projected life of the resources, project life cycle and effect on project competitiveness),

- Typical industry contracts and resulting corporate structures to inform the choice of agreements and matrix of relationships between the State, project sponsors and others (e.g. options available to formalize agreements between the State and investors, types of corporations, partnerships, public and private partnerships, technical partnerships and marketing arrangements),

- Types of agreements (what aspect each addresses, the pros and cons of various agreements, models versus tailor-made agreements).

4.3. PHASE III: POST-NEGOTIATIONS

4.3.1. TRAINING MODULE I: IMPLEMENTING AGREEMENTS AND ADMINISTERING CONTRACTS

After negotiations are concluded, there are several important activities that must be carried out to ensure desired outcomes are met. This module is intended to achieve this and enable the negotiation team and others responsible for contracts management to effectively enforce the outcomes of negotiations. It covers:

- Documentation of comprehensive legal documents (the process, agreeing who does what, understanding what formats exist and how to select the correct one),
- Documenting and compiling background documents by the negotiation team for administrators,
- Documenting and compiling technical records by external experts for their government counterparts,
- Developing a high-level summary of agreements for quick reference,
- Identifying parties responsible for meeting obligations or receiving deliverables from counterparties,
- Developing an implementation plan and a process review mechanism,
- Listing implementation tools (clear gateways and “trigger mechanisms”, identification of state entitlements, timing and channels for receipts, identification of state obligations and timing, identification of investor obligations, timing, and resources implications, appointment of the members of a team accountable for implementation (this may require more than one individual depending on the range of agreements signed and provisions. For instance, a fiscal expert, an environmental expert or a marketing expert may be needed), composition of an implementation team to review progress and report at pre-agreed stages),
- Understanding the role and duties of government representatives on the board of companies in which the State invests (e.g. board members).
Below are examples of the merits of the activities above as mechanisms for ensuring the correct outcomes from negotiators.

**Documentation of comprehensive legal agreements.**
It is necessary for the parties to capture the terms and conditions of the agreements into a legally binding and enforceable set of contracts called “Heads of Agreement” in keeping with the laws of the country and any relevant international treaties. This serves as the basis for producing detailed agreements and briefing principals reliably as it is not uncommon for legal teams to have different interpretations of the agreement highlights. Therefore, a “Heads of Agreement” immediately identifies any misunderstandings or misinterpretations and permits consensus before detailed agreements are drafted.

**Systematic handover of information from the negotiation team to the implementing team.**
Negotiation teams often involve external experts who are not State employees. As such, it is necessary for these experts to be given time to transfer documentation, knowledge and background information that might not be reduced in writing to those who will implement the agreements. Apart from ensuring competent administration of agreements, this exercise also transfers skills and institutionalizes knowledge within government.

**Administration of the contracts.**
While the office of the Attorney General typically acts as custodian of the documentation, several state agencies assume accountability for day-to-day implementation of the different clauses. It is thus imperative to clearly identify roles in administering the contracts and have a concrete implementation and monitoring plan. The absence of a proper plan can reduce the value captured in the agreements or result in the State defaulting, litigation and material repercussions. To avoid these undesirable outcomes, developing a detailed implementation plan with clear gateways and “trigger” mechanisms for enforcing specific clauses is essential. The plan has the effect of;

- Identifying state entitlements, their timing and channels for receipts,
- Identifying state and investor obligations, their timing and resource implications,
- Availing a team accountable for the implementation,
- Determining the team to review progress and report at pre-agreed intervals.

In the absence of a real life case, it is impossible to anticipate all elements of a negotiation strategy and those issues that may arise during the negotiations. However, the ANRC tool adequately covers the generic governance, strategic and practical aspects. Used to guide an approach to negotiations, it will not only strengthen the capacity of representatives of African governments, but it will also reduce the risk of poor outcomes.

**5. CONCLUSION**