

Negotiating and drafting bilateral agreements

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Introduction

- Preparation
- At the negotiating table
- Practical examples and extracts given

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Negotiation basics – Preparation

- Try to clearly define scope of the text in advance of meetings
 - If not possible then arrange a meeting purely on scope
- **Practical example – defining what is meant by mutual legal assistance**
- Know the relevant law and policy
 - be prepared to give full explanations

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Extracts

Assistance shall include:

- (a) taking the testimony or statements of persons including by video-conference or television, according to the domestic law of the Requested Party;
- (b) providing documents, records, and other evidentiary material;
- (c) serving documents;
- (d) locating or identifying persons where required as part of a wider request for evidence;
- (e) transferring persons in custody according to article 11; executing requests for search and seizure; identifying, tracing, restraining, seizing, confiscating and disposal of proceeds of crime and assistance in related proceedings;
- (f) return of assets, in accordance with domestic law;
- (g) sharing of assets in accordance with domestic law;
- (h) such other assistance as may be agreed between the Central Authorities.

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Negotiation basics – Preparation

- Know their red lines (if possible)
- Know your red lines
 - What issues that will make you/them walk away from the ‘table’
- Practical examples – death penalty; dual criminality for coercive measures; human rights guarantees
- Know what you are prepared to negotiate away
 - Be prepared to drop less contentious points

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Extracts

- MINDFUL of the guarantees under their respective legal systems which provide an accused person with the right to a fair trial, including the right to adjudication by an impartial tribunal established pursuant to law;
- Assistance shall be provided without regard to whether the conduct that is the subject of the request would be punishable under the legislation in both Parties. Where a request is made for search and seizure of evidence, restraint or confiscation of proceeds of crime, the Requested Party may, at its discretion, render the assistance, in accordance with its domestic law.
- the execution of the request would prejudice the sovereignty, security, *ordre public* or other essential interests of the Requested Party;
- the request relates to a person who, if proceeded against in the Requested Party for the offence for which assistance is requested, would be entitled to be discharged on the grounds of a previous acquittal or conviction; or
- the request relates to an offence that is regarded by the Requested Party as an offence under military law, which is not also an offence under ordinary criminal law.

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Negotiation basics – Preparation

- Get in first with your draft text
 - Convince the other side to work from your text
 - Make your draft as comprehensive as possible
 - Easier to strike out than to add in
 - Remember that the preamble can be as important as the articles
- Practical example – asset sharing provisions, human rights

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Extracts

- In any case in which a Party is in possession of confiscated assets, and it appears to that Party ('the Holding Party') that co-operation has been given by the other Party ('the Co-operating Party'), the Holding Party may, at its discretion and in accordance with domestic laws, share those assets with the Co-operating Party.
- HAVING DUE REGARD for human rights and the rule of law;
- MINDFUL of the guarantees under their respective legal systems which provide an accused person with the right to a fair trial, including the right to adjudication by an impartial tribunal established pursuant to law;

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Negotiation basics – Preparation

- Come armed with other bilateral and multi-lateral texts
 - Be aware of alternative formulations
 - If you have already negotiated other texts have them to hand
- Be aware of what you have previously negotiated

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Examples

- UN texts and model treaties
- Council of Europe
- OECD
- Regional texts
- Bilateral texts

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At the table

- Be firm but flexible
- Show respect at all times
- When you get stuck try to ‘think outside the box’
- Use the expertise and experience of others in your delegation and from the other side
- Do not be afraid to explore new ways of doing things
- Have fun!!

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