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Do Companies Have Personalities? Understanding how extractive industry companies approach negotiations

By Mateusz Kasprowicz

When news of the discovery comes in, the entire Ministry is ready to celebrate. You are excited too, but you don't show it right away. Even though you hate being the serious one, as one of the Minister's key advisors and the person responsible for putting together the negotiating team, you just can't keep yourself from thinking ahead. A petroleum discovery holds a huge promise—revenues for your government, funding for the Ministry, the potential for technology transfers, all good things—yet you know that the benefits of a discovery do not fall in the government's lap, they have to be negotiated. To make sure these negotiations go right, you have to be adequately prepared. In a rush, negotiations fall victim to political infighting and, with competing bids now streaming in, the government may squander its best chance to shape the eventual agreement.

Months go by and a favored bidder emerges. The Ministry is abuzz with talk. People ask: what kind of company is this? Do they really want to develop the project? What's their strategy? Can we trust them? You struggle to answer these questions from your colleagues. In fact, you cannot say exactly how the company will conduct negotiations with your team.

Let's start with what we already know. The company made a reasonable bid, not the highest or the lowest. The lowest bidder, you think, had internal problems so you made sure someone in the Ministry checked their stock-market filings. They found that the company was listed on AIM, London's Alternative Investment Market, which has no listing requirements and a history of problematic oil and gas companies.[1] The company with the favored bid is listed on an American stock exchange and you know they have certain mandatory disclosures of, for example, annual financial statements. One of your colleagues recently returned from a capacity-building seminar in the United Kingdom and voiced concern over American companies based on some of the talk among other participants. His concern is the negotiating style. "Americans are stubborn and ruthless negotiators" he explains and suggests the Ministry opt for a European firm instead. You, however, are skeptical. This convenient way of explaining negotiating strategy through cultural stereotypes and style seems difficult to rely on. But you wonder: there must be characteristics and traits that shape how a company acts. Does a company, like a person, have a personality?

[1] Joe Bell. Interview. Columbia Center on Sustainable Investment. http://ccsi.columbia.edu/files/2018/02/Joe-Bell-Company-Personality-CCSI-June-2019.pdf

You reach out to a friend of yours in another government and ask her about her experiences negotiating with European firms as opposed to American ones. She has years of experience leading negotiating teams for her Ministry. You tell her about some of the things you have heard: Europeans tend to be opaque, careful negotiators with an added cultural savviness; Americans can be stubborn and very technical, gregarious but unlikely to compromise. She is confused by these differences. Yes, she says, there is some truth to them, but the cultural differences are not as important as the legal ones. At the end of the day, companies care about the same thing—the bottom line—and home-country legal regimes are the constraints they face along the way. In her experience, she says, these have been decisive. European countries, for example, have a tradition of civil law. Prescriptive and code-based, under civil law if something is not authorized, it is usually forbidden. In Anglo-Saxon countries like the United States and the United Kingdom, common law systems rely more on precedent and custom, hence contracts are necessarily more exhaustive. Companies from common law countries, she adds, are more likely to go to arbitration to settle disputes about the contract.[2] Embassies in different countries may be more or less likely to intervene, which also changes a company's calculations. Also important are domestic anti-corruption laws like the Foreign Corrupt Practices Act (FCPA) in the US and the Anti-Bribery Act in the UK.[3] Firms with these kinds of home-country laws have strict requirements and internal protocols. Likewise, they may be required to make additional disclosures. Ok, you say, I think I understand. Companies may come from different cultures, but personality might be the wrong word for exactly what makes them negotiate. Home country legal regimes and diplomatic ties are better predictors of negotiating behavior because they are the constraints that fundamentally shape how a company does business.

On the way home you run into a friend from university who has heard the news. "Is it true that the Ministry is beginning negotiations?" Even though you run in similar circles you are surprised that he found out so quickly. He registers the surprise on your face and comments about how, indeed, "talk spreads like wildfire." The two of you share a little laugh. You know from Facebook that he used to work for the legal department of a mining multinational and you decide to ask him what he thinks about company personalities.

Company personality or company strategy? he asks. Well, you say, I don't know, which one is more important? He takes a moment to think. The company's strategy and intentions are surely one part of the company's personality, but when it comes to negotiations, they are ultimately more important than style and culture. How does the project fit into the company's long-term financial and investment strategy? Does the company have technical capacity and is it interested in long term development? Is it vertically integrated and will it guarantee to maintain production even through rough patches in the market? These issues shape how a company negotiates. A company knows that by wearing a friendly face it can win trust and hide its true intentions. Be wary of a company with too much personality, he chides. A company will be nice to you while siphoning your revenue through its subsidiaries, using transfer pricing, bilateral treaties (BITs) and double tax agreements (DTAs). Big companies especially prioritize shareholders and want to keep financing costs low. They will avoid providing guarantees or

2 Salli Swartz. Interview. Columbia Center on Sustainable Investment. http://ccsi.columbia.edu/files/2019/08/Salli-Swartz-Company-Personality-Interview-May-2019-CCSI.pdf

3 Lou T. Wells. Interview. Columbia Center on Sustainable Investment. http://ccsi.columbia.edu/files/2018/02/Lou-Wells-Company-Personality-Interview-March-2019-CCSI.pdf

carried interests on behalf of their local partners (including national oil companies) and they tend to shy away from project-specific financing.[5] Watch out!

As you part ways you think about his advice. Your friend's practical reasoning has given you a clear set of priorities. You feel sure that the favored bidder is reliable and high-capacity, and they expressed an interest in developing the project over the long term, though you should still consider including working provisions in the contract just in case production stops and the company wants to hold onto the license to speculate.[6] You are more concerned the asymmetry of information and about the company overwhelming you on technical capacity. By now you have figured out that companies listed on the big stock exchanges like New York, Tokyo, London or Hong Kong are more rule and procedure-driven. You know that you need your own model contract to keep them from dominating the discussion and to outline acceptable outcomes. You want to avoid signing abusive stabilization clauses or unfair fiscal terms.[7] You also know that you should look into whether or not the company plans on working through subsidiaries and benefiting from their home country tax rules, so that you can create a fair mechanism to assess transfer pricing.[8] Even if it is a large company, it always makes sense to do due diligence, check their financial background and, if possible, their sources of funding. You decide to see if there are any audited investment/securities statements. Another trick that you understood is that imposing on the large companies bidding for your project to work in joint venture could prevent the optimization of your project's exploitation from being subject to one company's business strategy.[9]

When you return to the office the following day you are feeling less nervous about the months ahead—you know what needs to be done. The Minister asks you what you think about the impending negotiations and you take a moment to reflect. "I heard it was an American company and they don't like to compromise," she says. "Well," you say, "they might be strong on capacity and want to manage the risks the best way they can. I think it is less a matter of culture and personality and more a matter of its legal constraints, long-term strategy and priorities. A company's negotiating behavior is determined partly by its legal origin and partly by its bottom line" You feel good about your response after your conversations of the previous day, but the minister continues. "What do you know about the company's projects elsewhere," she asks, "have you done any research?" So far you have only researched the company's portfolio, financial structure and legal regime. "I think I have a good sense of how our project fits into their strategy," you reply, but you see the logic of her point. The best way to prepare for negotiations is to check the company's track record on environment, local content, human rights and arbitration in previous projects.

[5] Tom Mitro. Interview. Columbia Center for Sustainable Investment. http://ccsi.columbia.edu/files/2019/03/Interview-Company-Personalities-Tom-Mitro-Jan-2019-CCSI-Final.pdf

[6] Lou T. Wells. Interview. Columbia Center on Sustainable Investment. http://ccsi.columbia.edu/files/2018/02/Lou-Wells-Company-Personality-Interview-March-2019-CCSI.pdf

[7] Tony Paul. Interview. Columbia Center for Sustainable Investment. http://ccsi.columbia.edu/files/2019/04/Interview-Company-Personalities-Tony-Paul-Feb-2019-CCSI-Final.pdf

[8] Tom Mitro. Interview. Columbia Center for Sustainable Investment. http://ccsi.columbia.edu/files/2019/04/Interview-Company-Personalities-Tony-Paul-Feb-2019-CCSI-Final.pdf

[9] Tony Paul. Interview. Columbia Center for Sustainable Investment. http://ccsi.columbia.edu/files/2019/04/Interview-Company-Personalities-Tony-Paul-Feb-2019-CCSI-Final.pdf

The final step is sharing all of your insights with the Minister and the rest of your coworkers. Working out a comprehensive strategy for the negotiations requires working with ministers and officials from different backgrounds, offices and agencies and with different interests that might not be easily compatible. Figuring out priority issues, crafting a negotiating strategy, putting together a model contract and a suitable and tailored negotiating team with internal agreement is no easy feat, but it requires, first of all, an understanding of the partner company.[10]

[10] Salli Swartz. Interview. Columbia Center on Sustainable Investment. http://ccsi.columbia.edu/files/2019/08/Salli-Swartz-Company-Personality-Interview-May-2019-CCSI.pdf