

Drafting a New Treaty

PART ONE : PREPARATION

Dr. Shiva Kumar Giri
Associate Dean & Full-
time Faculty, KUSoL

TREATY - OVERVIEW

- Derived from the French word *traiter*, which means to negotiate .
- The 1969 Vienna Convention defines a treaty as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".
- The 1969 Vienna Convention extends the definition of treaties to include international agreements involving international organizations as parties.
- International agreements between States, or between International Organisations, or between any combinations thereof, which are governed by International law (Ivor Roberts).
- Used as a generic term embracing all instruments binding at international law concluded between international entities.

- Treaties are typically divided into two main categories, multilateral and bilateral :
- A multilateral treaty is a treaty involving more than two parties. **Example** : UNCLOS (United Nation Convention on the Law of Sea, 1982), Kyoto Protocol 2005 etc.
- A bilateral treaty involves an agreement between two parties. **Example** : The India-Nepal Treaty of Peace and Friendship, 1950, Nepal- UK Bilateral Investment Treaty (BIT) etc.
- Treaties are commonly called 'agreements', 'conventions', 'protocols' or 'covenants' , and less commonly 'exchanges of letters'. Frequently, 'declarations' are adopted by the UN General Assembly. Declarations are not treaties, as they are not intended to be binding, but they may be part of a process that leads ultimately to the negotiation of a treaty.

PREPARATION

There are certain preconditions that are required before drafting any treaties :

- Knowledge of Subject Matter
- National Interest and Stakeholders Involvement
- Language Authenticity
- Knowledge of Authority
- Informed - Impact Assessment
- Contextual Knowledge of Other Party

1. KNOWLEDGE OF SUBJECT MATTER

- Before entering into the drafting phase, parties must be in the position capable enough to articulate the issues and challenges the treaty aims to address. **Example:** The Paris Agreement on climate change. The clear objective is to limit global temperature increases well below 2 degrees Celsius above pre-industrial levels and pursue efforts to limit the temperature increase to 1.5 degrees Celsius.
- Must be in the position to define the specific objectives and purpose of the treaty . Thoroughly understand the subject matter, including its legal, political, economic, and social aspects. **Example:** The Comprehensive Nuclear-Test-Ban Treaty (CTBT). Drafters needed a deep understanding of nuclear weapons testing, its implications, and the scientific aspects involved in monitoring and verification.

Sound knowledge on the matter is required depending on the nature of agreement.

Example

Treaty relating to tax

For any bilateral treaty to avoid double taxation between two States, the formula to avoid the double taxation must be known, presented and adopted.

Treaty relating to investment

Provisions of promotion and protection of investment with mechanism like national treatment.

Treaty relating to trade

For any multilateral treaty relating to trade, the knowledge regarding the import and export mechanisms, rules of origin.

2. NATIONAL INTEREST AND STAKEHOLDERS INVOLVEMENT

- **Legal Understanding:**

- Parties must be familiar with their own country's laws, systems, and policies to align the treaty with the domestic legal framework.

- **Problem Identification and Resolution:**

- Clearly identify and address specific problems through the treaty, ensuring it serves as a solution to national challenges.

- **Review of Existing Treaties:**

- Analyze existing treaties of similar nature to understand the international legal landscape. Determine whether their State/ IO and Other State is already a party to similar bilateral or multilateral agreements and take into account the relevance, obligations, and potential conflicts with the proposed treaty.

- **National Interest Prioritization:**

- Identify and prioritize national interests, such as economic growth or environmental protection, that the treaty aims to advance. Comprise if required, that in minimum points.

- **Stakeholder Involvement:**

- Engage relevant stakeholders, including government agencies, experts, businesses, and affected parties, for a comprehensive perspective. Example : The North American Free Trade Agreement (NAFTA, now USMCA). The treaty aimed to promote economic growth among the member countries (United States, Canada, and Mexico) by addressing trade issues and involving key stakeholders such as businesses and labor unions.

- **Expert Involvement:**

- Seek the input of experts in relevant fields to ensure a well-informed and technically sound treaty. Experts contribute specialized knowledge, helping to address complex issues and contributing to the effectiveness of the treaty by promote transparency and inclusivity.

3. LANGUAGE AUTHENTICITY

- **Clear and Precise Language:**

- It is imperative that the treaty is drafted in clear, precise, and unambiguous language to avoid misinterpretations and ensure mutual understanding.

- **Linguistic Authenticity:**

- Drafting treaties requires linguistic authenticity, where the language accurately reflects the intended meaning and considers the cultural nuances of the parties involved. This authenticity fosters a shared understanding and commitment.

- **Cultural Sensitivity:**

- Language in treaties should be crafted with cultural sensitivity, acknowledging and respecting the diverse cultural backgrounds of the parties. This consideration promotes inclusivity and cooperation in the implementation of treaty provisions.

- **Avoid Ambiguity:**

- Parties must diligently avoid ambiguity in treaty language to prevent misunderstandings and disputes during the interpretation and execution of the agreement. Clarity is key to fostering effective compliance.

- **Legal Terminology Consistency:**

- Consistency in legal terminology is crucial for the effectiveness of a treaty. Ensuring uniform language enhances precision and reduces the likelihood of conflicting interpretations among parties.

- **Accessibility for All Parties:**

- Accessibility in language is fundamental to a treaty's success, enabling a broad understanding and commitment from all parties involved. The language should be comprehensible to both technical experts and the general public.

- **Language Check :**

- Acknowledge that just because negotiations may have been conducted in one language, such as English, doesn't diminish the importance of accurate translations in other languages. All parties must be assured of the precision and correctness of the text in their respective languages. Parties should be equipped with a reliable translation service to ensure accurate and faithful translation of the treaty into all languages involved. If a party lacks an in-house translation service, it is advisable to consult with other delegations to share the responsibility for obtaining accurate translations.

- **Bilateral Treaties and Language Verification:**

- In the case of bilateral treaties, parties should exercise caution and have the text in the other party's language thoroughly checked by their own translators. This verification process is essential to avoid unintended consequences or misinterpretations that could arise from linguistic differences.

4.KNOWLEDGE OF AUTHORITY

- The parties to the treaty must know that any person who adopts, initials or signs a treaty must have authority to do so. Such authority is as laid down by international law (Article 7, VCLT 1969). Additionally, there may be domestical law requirements to satisfy as well.
- Only three State representatives can sign a treaty without need to produce full powers (the Head of State, the Head of Government and the Foreign Minister). This is because of the vary nature of position and power they hold.
- Every other person signing the treaty has to produce Full Powers from one of these three authorities of States, however there are some exceptions to it (usually bilateral treaty as indicated in Article 7(1)(b) VCLT 1969).

5. INFORMED - IMPACT ASSESSMENT

- **Understanding Impact Assessment:**

- Parties involved in drafting a treaty must comprehend the significance of impact assessment. This involves evaluating the potential economic, social, and environmental consequences that may arise from the implementation of the treaty.

- **Anticipating Negative Consequences:**

- Informed parties should actively anticipate and identify potential negative consequences that may result from the treaty's provisions. This involves a forward-looking approach to foresee challenges and issues that could arise during and after the implementation phase.

- **Mitigating Adverse Effects:**

- To ensure a well-balanced and beneficial treaty, parties need to actively engage in the process of mitigating any identified adverse effects. This may involve incorporating safeguards, adjustments, or additional provisions aimed at minimizing negative impacts on the involved parties.

- **Learning from Example - Convention on Biological Diversity (CBD):**

- Parties can draw insights from examples such as the Convention on Biological Diversity (CBD). The drafters of this treaty considered the potential impact of human activities on biodiversity and ecosystems. This proactive approach aimed to conserve biological diversity and ensure its sustainable use, showcasing the importance of impact assessment in achieving treaty objectives.

By being informed about impact assessment and actively participating in the evaluation and mitigation of potential consequences, parties contribute to the development of a more effective, equitable, and sustainable treaty.

5. CONTEXTUAL KNOWLEDGE OF OTHER PARTY

- **Understanding Other Party's Legal System:**

- Prior to drafting a treaty, it is crucial for each party to have a comprehensive understanding of the legal system of the other party. This involves recognizing legal traditions, principles, and nuances that may impact the interpretation and implementation of the treaty.
- **Example:** In the negotiation of international trade agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), parties need to be aware of the diverse legal systems among member countries to ensure the compatibility of the treaty with each jurisdiction.

- **Awareness of Cultural and Social Context:**

- Parties should possess contextual knowledge of the cultural and social environment of the other party. This understanding helps in crafting provisions that are sensitive to cultural differences and societal norms, fostering better cooperation and acceptance.
- **Example:** The United Nations Educational, Scientific and Cultural Organization (UNESCO) conventions, like the Convention for the Safeguarding of the Intangible Cultural Heritage, necessitate an understanding of diverse cultural contexts to effectively preserve and protect cultural heritage.

- **Economic and Political Landscape:**

- Having a grasp of the economic and political landscape of the other party is vital. This knowledge enables parties to align treaty provisions with the economic interests, policies, and political realities of each country, promoting mutual benefit.
- **Example:** Bilateral investment treaties (BITs), require an understanding of each country's economic priorities and political considerations to facilitate foreign investment and economic cooperation.

- **Historical Context and Diplomatic Relations:**

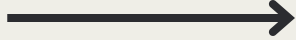
- Parties should consider the historical context and diplomatic relations between the nations involved. Knowledge of past agreements, conflicts, or collaborations can influence the negotiation process and help build trust between parties.
- Having a deep contextual knowledge of the other party's legal, cultural, economic, and historical aspects is essential to crafting a treaty that is effective, culturally sensitive, and aligned with the interests and realities of all parties involved.

- **Understanding and Acknowledging Other Party's Interests :**

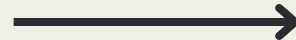
- Recognize the importance of understanding and acknowledging the interests of the other party involved in the treaty negotiation inline with one's own interest. This requires a thorough assessment of their economic, political, and social priorities.
- Strive for a treaty that promotes mutual benefit and balanced outcomes for both parties. Consideration of the other party's interests fosters cooperation and increases the likelihood of successful negotiations.

MAKING A TREATY : PROCESS OVERVIEW

Negotiation



Preparation



Drafting



Production

Thank You
