

Treaty making

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Views presented here do not represent any organization

Laws relating to treaty-making

Constitution of Nepal

Nepal Treaties Act, 1990

सन्धि सम्पन्न गर्ने सम्बन्धी निर्देशिका,
२०७७

Vienna Convention on the
Law of Treaties, 1969
(Vienna Convention)

Treaty Definition

- Art. 2.1(a) of the Vienna Convention:

“treaty” means 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

In 1986, treaty between States and International Organizations or between International Organizations is also included (*Vienna Convention on the Law of Treaties between States and Int’l Organizations or between International Organizations*)

Definition Contd.

- Nepal Treaties Act, 1990 (2a):
"Treaty" means an agreement concluded in writing between two or more States, or between a State and inter-governmental organization and this term also includes any instrument of this nature whatever its particular designation.

Definition Contd.

Madhab Paudel, 2054 defines treaty having the following elements:

- Participation and consent of the personalities of International law

- Agreement governed by International law

- Consent of the participants to perform rights and duties under the agreement

Sources of PIL

- **ARTICLE 38 OF THE 1945 STATUTE OF THE INTERNATIONAL COURT OF JUSTICE**

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Importance of Treaty

- Primary source of international law
- Common method to conduct international relation
- To codify, clarify and make progressive development of international law
- To create international organization/ enact a fundamental, organic and constitutional law such as Covenant of League of Nation
- Clearer and less controversial than the international custom
- Method of expressing international personality
- A method of peaceful settlement of international dispute, etc.

Designation of Treaty

- Treaty
- Convention
- Charter
- Final Act
- Statute
- Declaration
- Protocol
- Agreement
- Arrangement
- Exchange of Notes (Exchange of Letters)
- Pact
- Memorandum of Understanding
- Aid Memoire
- Covenant, etc.

Designation of Treaty Contd.

Designation does not affect the validity and binding nature of a treaty nor affect the rights and obligations of the parties.

- Treaty: common expression
- Convention: Used to govern the matters having universal importance, such as Vienna Convention on the Law of treaties, Vienna Convention on Diplomatic Relations, Convention on Elimination of all forms of Discrimination against Women, Convention on Elimination of all forms of Racial Discrimination, etc.
- Charter: Used to create international organizations such as United Nations Charter, SAARC Charter.
- Final Act: Sometime used to refer a treaty signed upon completion of high level conference such as **Helsinki** Final Act (Peace and Security in Europe)
- Statute: Used to create international organizations such as Statutes of ICJ, ICC

Designation of Treaty Contd.

- Declaration: Sometimes used to refer to agreement between some states on any matter or to interpret a treaty provision such as Berlin Declaration, 1882
- Covenant: Sometime used to refer to agreement of international importance such as ICCPR, ICESCR, etc.
- Protocol: Sometime used to refer to agreement of international importance or to supplement convention such as Protocol to United Nations Framework Convention on Climate Change, Optional Protocol to the International Covenant on Civil and Political Rights, Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, etc.
- Agreement: Usually used in bilateral agreements.
- Arrangement: Used for provisional rules.

Designation of Treaty Contd.

- Exchange of Notes (Exchange of Letters): Used to amend, interpret, extend or terminate a treaty, to create rights and obligations between the parties on any specific matters (bilaterally).
- Pact: Used to refer to a treaty on political and military alliance such as Paris Pact, 1928, **Warsaw** Pact, 1954, etc.
- Memorandum of Understanding: Used to refer to understanding reached between the parties (Bilaterally). Though it is not considered as binding instrument, Supreme Court of Nepal held Memorandum of Understanding as binding instrument.

Classification of Treaties

On the basis of subject matter to be governed by the treaty:

- Political Treaties: Extradition Treaty, Peace and Friendship Treaty, Treaty on Boundary, Neutrality, Military, etc.
- Economical and commercial Treaties
- Others (Miscellaneous)

On the basis of importance and nature of the extent of treaty:

- Universal: United Nations Charter, etc.
- Regional: SAARC Charter, etc.
- Bilateral: BIPPA, etc.

Classification of Treaties Contd.

On the basis of participants:

- Bilateral
- Multilateral

On the basis of importance in international law:

- Law making treaties
- Contract

देहायको कुनै वषय कार्यन्वयन गर्न सन्धि गर्ने प्र क्रयौ प्रारम्भ गरिने

- संकल्प प्रस्ताव
- सर्वोच्च अदालतको फैसला
- संवैधानिक निकायको सफारिस
- नीति कार्यक्रम वा बजेट
- संयुक्त राष्ट्र संघको प्रस्ताव वा घोषणा

देहायको कुनै वषय कार्यन्वयन गर्न सन्धि गर्ने प्र क्रयौ प्रारम्भ गरिने क्रमशः

- मानव अ धकार सम्बन्धी वशव्यापी आव धक पुनरावलोकन अन्तरगतका सफारिस
- सन्धि संयन्त्र (Treaty body) को सफारिस वा टिप्पणी
- द्वपक्षीय बैठक वा भेटघाटमा भएको समझदारी
- अन्तर्राष्ट्रिय बैठक, सभा वा सम्मेलनको आह्वान
- नेपाल सरकार मन्त्रिपरिषदको निर्णय

અધ્યયન ટોલી

- પ્રારમ્ભિક અધ્યયન
- વસ્તૂત અધ્યયન
- વાર્તા ટોલી
 - સમ્બન્ધિત મન્ત્રાલય,
 - કાનૂન મન્ત્રાલય
 - પરાષ્ટ્ર મન્ત્રાલય
 - અન્ય સરોકારવાલ મન્ત્રાલય વા નિકાય
 - સમ્બન્ધિત વષયકા વજ્ઞ

Basis of International Relations

- Sovereign equality
- Safeguarding freedom, sovereign equality, territorial integrity, independence, and national interest of Nepal
- Charter of the United Nations
- Non-alignment
- Principles of *Panchsheel*
- International law
- Norms of World Peace
- Equality
- Mutual interest and reciprocity

Principles of United Nations

- Sovereign equality
- Fulfillment of treaty obligation in good faith
- Settlement of international disputes by peaceful means
- Refraining from threat or use of force
- Giving every assistance in any action taken by the United Nations
- Non-intervention

Supremacy of UN Charter

UN Charter: Article 103

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

प्रारम्भिक अध्ययन गर्ने

- सन्धिको असर वा प्रभाव,
- त्यस्तो असर वा प्रभाव व्यापक, गम्भीर वा दीर्घकालीन प्रकृतिको हुने वा नहुने,
- सम्भाव्य असर र चनौती,
- कार्यान्वयन गर्ने कानून आवश्यक पर्ने वा नपर्ने
- कार्यान्वयन गर्ने आवश्यक संस्थागत संयन्त्र वा अन्य व्यवस्था
- आर्थिक दायित्व
- राष्ट्रिय हित वश्लेषण
- नेपालको अडान वा धारणा

वस्तुत अध्ययन गर्ने

- प्रारम्भिक अध्ययनबाट सफारिस भएको सन्धि
- अनुमोदन, सम्मिलन, स्वीकृति र समर्थन गर्नुपर्ने सन्धि
- नेपाल सरकार, सम्बन्धित मन्त्रालय वा समन्वय स मितिले वस्तुत अध्ययन गर्नुपर्ने भनी निर्णय गरेको सन्धि

Processes of multilateral treaty making

- United Nations- UNHCR
- Specialized agencies- ILO
- International Law Commission
 - Codification and progressive development of international law
 - “Law-making treaties” (laying down the rules of universal application) are of paramount importance as sources of general international law
- United Nations General Assembly
- GA Resolutions
 - UDHR
 - UN Declaration on Elimination of All Forms of Racial Discrimination, 1963
 - Declaration of the Rights of the Child, 1959
 - Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1975
- Diplomatic conference
- Ad hoc Committee

Stages in Treaty Making

- Accrediting of negotiator (Full Powers)
- Negotiation (Conference for multilateral treaties)
- Adoption of Text
- Authentication of Text
- Signature
- Ratification
- Accession
- Commencement
- Registration and publication,
- Enforcement

Accrediting of negotiator (Full Powers)

- State is personality of International law
 - State has to designate formally representative to negotiate or sign
 - Full Powers: Art. 2.1 (c) of Vienna Convention
- “full powers” means a document emanating from the competent authority of a State designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty

Full powers Contd.

Section 2 (b) of Nepal Treaties Act:

“Full Power” means the document emanating from Government of Nepal designating a person or persons to represent the State for negotiating, adopting or authenticating the text of a treaty, or to sign the treaty and this term also includes the authority granted to make reservations when negotiating or signing a treaty, or to accomplish any other act with respect to a treaty

Full powers Contd.

Section 3 (1) of the Nepal Treaties Act:

Nobody other than following Office-bearers without full powers shall represent the State for negotiating, adopting or authenticating the text of a treaty, or sign the treaty, or make reservations when negotiating or signing a treaty, or accomplish any other act with respect to a treaty:

1. President
2. Prime Minister
3. Minister for Foreign Affairs

Full powers Contd.

Section 3 (1) of the Nepal Treaties Act:

Nepali Ambassador or Chief of Mission with regard to the state or international organization for which he/she is accredited or leader of the delegation to participate in an international conference with regard to that conference may represent the State for negotiating, adopting or authenticating the text of a treaty.

Adoption of Text

Article 9 of the Vienna Convention

1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.
2. The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.

Authentication of Text

Article 10 of Vienna Convention

The text of a treaty is established as authentic and definitive:

- (a) by such procedure as may be provided for in the text or agreed upon by the States participating in its drawing up; or
- (b) failing such procedure, by the signature, signature ad referendum or initialling by the representatives of those States of the text of the treaty or of the Final Act of a conference incorporating the text.

Signature

Signature ad referendum:

It is the signature made by the representative to be confirmed by the competent authority of the state.

Definite Signature: Art. 12 (1) of the Vienna Convention:

The consent of a State to be bound by a treaty is expressed by the signature of its representative when:

- (a) the treaty provides that signature shall have that effect;
- (b) it is otherwise established that the negotiating States were agreed that signature should have that effect; or
- (c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.

Ratification

Art. 2.1 (b) of the Vienna Convention:

“ratification”, “acceptance”, “approval” and “accession” mean in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty

Why ratification?

- Opportunity to State to consider a treaty signed by its representative
- State may denounce or express consent to be bound under the principle of sovereignty
- To get adopted from the legislative which has the authority to enact enabling legislation for implementation of treaty
- Opportunity to present the treaty before the legislative before it becomes a party
- To avoid secret treaty

Ratification Contd.

Art. 14 of the Vienna Convention

1. The consent of a State to be bound by a treaty is expressed by ratification when:
 - (a) the treaty provides for such consent to be expressed by means of ratification;
 - (b) it is otherwise established that the negotiating States were agreed that ratification should be required;
 - (c) the representative of the State has signed the treaty subject to ratification; or
 - (d) the intention of the State to sign the treaty subject to ratification appears from the full powers of its representative or was expressed during the negotiation.
2. The consent of a State to be bound by a treaty is expressed by acceptance or approval under conditions similar to those which apply to ratification.

Accession

Art. 15 of the Vienna Convention

The consent of a State to be bound by a treaty is expressed by accession when:

- (a) the treaty provides that such consent may be expressed by that State by means of accession;
- (b) it is otherwise established that the negotiating States were agreed that such consent may be expressed by that State by means of accession; or
- (c) all the parties have subsequently agreed that such consent may be expressed by that State by means of accession.

Nepali legal provision on ratification and accession

Art. 279 of the Constitution of Nepal

Treaties that require ratification, accession, acceptance, or approval by a two-thirds majority of the total number of members of the Federal Parliament existing for the time being are related to the following subjects:

- (a) Peace and friendship affecting the nation extensively, seriously or in the long term ;
- (b) Defense and strategic alliance;
- (c) Boundaries of the State of Nepal; and
- (d) Natural resources, and the distribution of their uses affecting the nation extensively, seriously or in the long term.

Art. 279 of the Constitution of Nepal

- Treaties that require ratification, accession, acceptance, or approval by a simple majority of the House of Representatives are related to the following subjects:
 - (a) Peace and friendship treaties, of an ordinary nature, not affecting the nation extensively, seriously or in the long term; and
 - (d) Treaties on Natural resources, and the distribution of their uses, of an ordinary nature, not affecting the nation extensively, seriously or in the long term.

Nepali legal provision on ratification and accession Contd.

Section 4 of the Nepal Treaties Act, 1990:

In addition to the treaties as referred to in Article 279 of the Constitution, the following treaties are subject to ratification, accession, approval, and acceptance:

- A treaty which requires ratification, accession, approval, and acceptance
- A treaty that establishes an inter-government organization or a treaty through which membership of such organization is acquired or a treaty contrary to the law in force.

Section 6 of the Nepal Treaties Act

- **All treaties and agreements other than those referred to in Article 279 of the Constitution and Section 4 of the Nepal Treaties Act, 1990 must be approved by the Council of Ministers of the Government of Nepal.**

Principles of Treaty

Pacta Sunt Servanda (Article 26 of the Vienna Convention on the Law of the Treaties)

"Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

2. Internal law and observance of treaties (Article 27 of the Vienna Convention on the Law of the Treaties):

"A party may not invoke the provision of its internal law on justification for its failure to perform a treaty..."

3. *Jus cogens* (Compelling Law, Peremptory norms of international law) is a fundamental principle of international law which is accepted by the international communities of States as a norm from which no derogation is ever permitted.

चुनौति

- दोहोरो कराधान मुक्ति, हवाई सेवा, द्विपक्षीय लगानी (BIT), प्रत्यक्ष विदेशी लगानी (FDI), BOOT, FIDIC Rules, Dispute Settlement, Governing Law, वाणिज्य व्यापार (पारवहन), उर्जा, जस्ता विषयहरूका सन्धि सम्झौताका वार्तामा सहभागी हुनु पर्ने कर्मचारीहरूलाई ती विषयहरूका आधारभूत कुराहरूको जानकारी दिने गरी तालिम दिन सकिएको अवस्था छैन
- वार्ताको सीप सम्बन्धी तालिम समय समयमा हुन सकेको छैन।
- आन्तरिक गृहकार्य गरी आफ्नो BATNA, WATNA, Bottom Line, Stand and Position के हुने स्पष्ट हुने र अर्को पक्षका BATNA, WATNA, Bottom Line, Stand and Position को जानकारी लिई strategy बनाउने गर्न सकिएको छैन।

चुनौति क्रमशः

- अन्तरराष्ट्रिय कानूनका बारेमा व्यापक र गहन छलफल हुने संयुक्त राष्ट्र संघको महासभाको 6th Committee, UNCTAD, HECH मा कानून मन्त्रालयको सहभागिता हुन सकेको छैन ।
- सबै जसो महासन्धिमा Conference of Parties ले पक्ष राज्यका लागि कानूनी रूपमा बन्धनकारी हुने निर्णयहरू गर्ने भए तापनि ती Conference हरूमा कानून मन्त्रालयको प्रतिनिधित्व भएको छैन ।

चुनौति क्रमशः

- वार्तामा सम्बन्धित कर्मचारीको निरन्तरता
- छिटो छिटो हुने सुरूवा
- कर्मचारी विज्ञतामा भन्दा पनि Incentive कहाँ छ भनेर बढि लालायित हुने गरेको।
- आन्तरिक गृहकार्य कमै हुने गरेको।
- सन्धि सम्पन्न गर्ने क्रममा वार्तामा सहभागी नगराउने,
- वार्ता टोली सदस्यलाई वार्ता गरिने मस्यौदा समयमा उपलब्ध नगराउने,
- सन्धि सम्झौताका सक्कल प्रति प्राप्त नहुने,
- कार्य जिम्मेवारी सम्बन्धी नवीनतम अभ्यासबारे अभिमुखीकरण तथा सीप-क्षमता विकास सम्बन्धी कृयाकलापको कमी, learning by doing गर्नुपर्ने अवस्था।

Thank you for your kind attention