Drafting a New Treaty

PART TWO : DRAFTING AND FINAL CLAUSES

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

DRAFTING A TREATY TEXT

- It is the process of creating the written document that outlines the terms, conditions, rights, obligations, and other provisions agreed upon by two or more parties entering into an international agreement. This process involves drafting the language and content of the treaty.
- A treaty can be concluded in one instrument or two or more. Some of the instruments which can constitute a treaty include: agreement, accord, act, convention, covenant, charter, pact, protocols, memorandum of understanding, exchange of notes/letters.
- Treaties do not have to be in any particular form. However, most single instrument bilateral or multilateral treaty follow a well established pattern with exception of exchanges of notes.
- When a bilateral treaty is formed by an exchange of notes/letters, the elements contained within them are essentially the same with certain variations in sequence and style .

THE STRUCTURE OF THE TREATY

The usual structure of a single instrument bilateral or multilateral treaty is :

- Title
- Identification of the Parties
- Preamble
- Record of agreement
- Main text
- Final clauses
- Testimonium
- Signature block
- Annexes (if any)

1 . T I T L E

- It consists of two elements : the designation (name) of the treaty and its purpose.

Name

- No consistent practise in naming whereas Agreement, Covenant and Treaty are perhaps the most common names. Other terms such as Act, Charter, Compact and Protocol are also used.
- Since there are differences between treaties and non-legally binding instrument like MOUs, one should draw and maintain a clear distinction between them and try to reflect in name.
- However, some treaties are still being called MOU.

Purpose

- The treaty title should be informative for which treaties should normally indicate subject matter of the treaty.
- Descriptive titles of multilateral treaties are frequently far too long therefore short hand title is used . Example : Fish Stocks Agreement is used for thirty nine words name of the treaty (the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks).

- The **title of bilateral treaty** should specify the parties by including the full and official name of the States or governments, for example : the Agreement between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Indonesia concerning the Delimitation of the Continental Shelf Boundary, 2003.
- Although a full names of the States should always be given in title, they can be abbreviated in the main text.

- The **title of multilateral treaty** usually do not refer to the parties in the title, but limited membership treaties may indicate the nature of limitation especially if its regional , for example : (‘European Convention on ……..’) or (‘African Agreement on …….’) .
- A few multilateral treaties refer to place of adoption in title. Example : Kyoto Protocol .

Does the word Treaty have to be in the Title?

- No, if the parties prefer not to use the word ‘treaty’ in the title, there are a number of alternatives.
- Convention or Agreement are commonly used.
- Charter or Statute (usually used for treaties that set up an institution) are less commonly used.
- Declaration or MOU (more commonly used for non-binding instruments and so are best avoided for treaties unless there is specific reason to use them in a particular case)

- The chosen name will not affect the legal status of the instruments as a treaty as its status is determined by its content and whether the parties intend it to be governed by international law.
- Names are generally chosen for descriptive and presentational reason.

2.IDENTIFICATION OF THE PARTIES

- The opening line of a treaty should identify the parties to the agreement, much like how a contract does.

- *Bilateral treaties :* the names of the parties are stated .
- For example : the Agreement between the Government of New Zealand and the Governemnt of the Republic of Turkey Relating to Air Services, 2010 begins :

The Government of New Zealand and the Government of the Republic of Turkey (hereinafter the Parties).

- *Multilateral treaties* : the opening words normally use a term such as ‘Parties’, ‘Contracting Parties’ or ‘State Parties’. That term may be expressly defined in the main body of the text. If not, definitions in Article 2 VCLT 1969 apply by implication .

- Example for multilateral treaties :

the United Nations Framework Convention on Climate Change, 1992 (UNFCCC) begins with ‘ The Parties to this Convention: ’. The Parties are not defined expressely, so by implication this term has the meaning set out in Article 2 (1)(g) VCLT 1969 and specify how States consent to be bound and when it comes into force for them.

- *Plurilateral treaties :* drafters may use either the bilateral or the multilateral style. An example of plurilateral treaty that uses bilateral style is the Treaty of Amelo which begins: “ The United Kingdom of Great Britian and Northern Ireland, the Federal Republic of Germany and the Kindgom of the Netherlands ; ”

Note : The opening line that refers to the parties can end with a semi colon(;) a comma (,) or a colon (:) but never with a full stop (.) .

3. PREAMBLE

- A preamble is an optional element of a treaty as a treaty does not have to have a preamble at all as it consists of statements which are not binding and not part of operative treaty text.
- The preamble of a treaty sets its background and context. And if there is nothing to be said, it is accepted not to have preamble.
- In bilateral agreements, the preamble should be brief and understandable in both parties' languages.
- Preamble in multilateral agreements tend to be longer due to the complexity of issues involved.
- It's advisable to address the preamble last in negotiations to avoid wasting time before finalizing the main text and clauses.
- Drafting a preamble is like writing the introduction to a book; it is easier to do once you know what is in the treaty. You can then ensure that it accurately reflects the contents of the body.

Bilateral Treaty :

Many bilateral treaties have a very short, but sufficient preamble while some have none at all. An example of short but sufficient preamble is :

The Kingdom of the Netherlands, in respect of Aruba, and
the Government of the Cayman Islands,
Desiring to strengthen the relationship between them through cooperation in taxation matters,
Have agreed as follows :

Multilateral Treaty :

It is usually considered useful to have some preambular paragraphs to provide some concise background. Example :

- state the overarching aim, principle, vision or motivation for the treaty:
- specify any specific real world problem it intends to remedy :
- refer to any previous treaty on the subject, especially if the new treaty is intended to supplement or replace it:
- refer to any negotiations that inspired the negotiations ; and /or
- acknowledge the existence of existing rules of customary international law on the same subject.

3.1 . The Beginnings of a Preamble :

For a bilateral treaty, the preamble usually begins :

“ The government of Freedonia and the Government of Utopia (’the Parties’)……

In multilateral agreements, the preamble is recommended to begin as :

“The States Parties to this Agreement/Convention/Treaty…..”

For Plurilateral agreements, i.e., between a few States only, the preamble often begins by naming all of the States negotiating the agreement. Plurilateral agreements are usually used in the trade context .

Using the term "States Parties" is advised as it acknowledges that treaties, although signed by representatives, are binding on the State itself, and upon the treaty's entry into force, the State becomes a party to the agreement.

3.2. The Content of a Preamble :

- Parties have the freedom to determine the content of the preamble in an agreement, allowing them to include what they deem essential.
- It is very important to draft the context of preamble with caution as the preamble forms part of the treaty's context which will be taken into account in the interpretation of any provision of the treaty (Article 31(2) VCLT 1969).
- It should not include :
  - text which is inconsistent with the operative provisions in the main body;
  - text which is unrelated to the main body ; or
  - substantive obligations which are intended to be binding.

3.3. The Style of a Preamble :

- The style of a preamble often involves the use of specific introductory phrases at the beginning of each paragraph, which are commonly italicized or underlined for emphasis.
- These phrases, such as :

  - "Recognising,"
  - "Noting,"
  - "Recalling,"
  - “Affirming,” “Desiring” or "Considering," serve to highlight the intentions and acknowledgments made within the preamble.

- They provide a structured framework for presenting the context, objectives, and historical background of the treaty in a clear and formal manner.

Note : The preamble is thus the (optional) filling in the sandwich, where the top is the opening line referring to parties and the bottom layer is the verb that states their agreement . Therefore, each preambular paragraph should end with a comma or a semi-colon, but never a full stop .

4.RECORD OF AGREEMENT

- It needs to be made clear that the parties have agreed on the contents of the main body (operative part) of the treaty.
- The expression of agreement is the hallmark of a treaty, as opposed to a non-binding instrument that expresses mutual aspirations, or a unilateral undertaking.
- Therefore, the preamble, whatever its length, should end with a final paragraph :

  Have agreed as follows :
- There are other variations in use such as ,

  Undertake as follows :

5.MAIN TEXT

- Treaty text is said to be the heart of a treaty. Treaties are tools of international life and so are in constant use; they should therefore be user-friendly.
- The problem is that they are becoming longer and more complex. Example : the Chemical Weapons Convention 1993 (CWC) is much more difficult to use. The fact that it has only twenty-four articles is misleading as some are quite unnecessarily long. Article VIII consists of no less than fifty-one paragraphs. Article IX has twenty-five paragraphs.
- Complex subjects in treaties should still strive for simplicity to ensure ease of use, as lengthy articles can hinder locating relevant provisions and increase the risk of errors, including inconsistencies.
- There are some suggestions to produce a better laid out text from the start :

Layout

- The layout and numbering of Vienna Convention itself is a good guide to right way to do it.
- It consists of eight-five articles, each with heading. No article is longer than six paragraphs.
- The articles are grouped into eight Parts, each with a short heading. These are then divided into Sections.

Headings

- Heading are extremely useful in helping to find one's way around the text, particularly if the numbers of the articles change during the negotiations.
- Although there can be arguments over exactly what should be in the heading, these are not serious and should not discourage the draftsman from inserting heading.
- Most headings **can be very short**. Those in the Vienna Convention are rather different in that some of them are summaries of the content of articles . **Example :** Article 18 being headed ' Obligations not to defeat the object and purpose of a treaty prior to its entry into force', but for that reason they can rather be useful sometimes.

Numbering

- The articles of Vienna Convention itself have Arabic numbers (1,2,3 etc.); the Parts have Roman numerals (I, II, III etc.) and Sections of Parts have Arabic numbers.
- In past, it was customary to use Roman numerals for articles and they are still found in new treaties.
- They should be avoided especially if the treaty has many articles. It is because Article 79 is so much easier to find than Article LXXIX.

Paragraph numbering

- If necessary, paragraph should be divided into paragraphs, sub-paragraphs and sub-sub-paragraphs.
- **Example :**

1. A state whose vessels....
2. Measures to be taken by a state in respect of vessels fying its flag shall include :
   (a) control of such vessels....;
   (b) establishment of regulations to:
      (i) apply terms....;
      (ii) prohibit fishing...;

Cross references

- If one is referring to an article of the treaty or to paragraph of that article, one should avoid pedantic cross referencing such as ‘ Article 4 above’ or ‘paragraph 6 below’ .
- Instead, one can add ‘Article 6 of this Treaty’ or ‘Paragraph 4 of this Article’.
- Use brief formula: ‘Article 4(6)(a)(i)’ rather that ‘Article 4, paragraph 6, sub-sub-paragraph (a) (i)’.

Footnotes

- Not usual to find footnotes to a treaty text.
- Should not, for example, be used to express the objection or reservation of one or more of the negotiating states to a provisions, or exlain that a particular phrase mean something different in certain of the authentic languages. Rather even if it is placed, its only for information, such as citation of a treaty mentioned in the text.

MOUs

- Points about layout and numbering apply generally to MOUs as well except one should use ‘Sections’ or ‘Paragraphs’ rather than ‘Articles’ which should only be used for treaties.

Definitions

- Definitions streamline treaty language, preventing lengthy repetitions and simplifying the text, especially in multilateral agreements where they establish a common understanding of key terms for interpretation and implementation.
- Consistency in defining terms and clarity about deviations are crucial in treaty negotiations to prevent misunderstandings and ensure a common minimum standard. **Example :** "Community" and "CARICOM" in the Caribbean context which refer to the Caribbean Community established by Revised Treaty of Chaguaramas (RTC).
- While readability is essential for broader community comprehension, sparing use of jargon may be necessary for effective implementation.

Terminology

- To clearly convey the intention of creating a legally binding treaty, it is customary to use well-understood terms such as "shall," "agree," and "rights" and "obligations" in both the main text and annexes.
- This distinguishes the treaty from a Memorandum of Understanding (MOU) and underscores the parties' commitment to their obligations.

Table of Contents

- Rare to find even in long and complex multilateral treaty. Notable exceptions are the Verification Annexes to the CWC and the CTBT.
- Sometimes unofficial table is added by a state when it publishes the treaty.
- No definite reasons why it is not commonly included in a treaty.

6.FINAL CLAUSES

- The final clauses, situated at the end of a treaty, sets out how the treaty is to operate.
- At the minimum, they need to specify how States (and IOs, if applicable) may express their consent to be bound (for example by signature, ratification, accession) and how the treaty will enter into force.
- Pay close attention to these clauses, as they may require important policy decisions to be taken.
- Do not copy and paste these clauses. Instead, create these clauses during the negotiations with the needs of the specific agreement in mind.
- Final clauses can include articles on :

- ***Relationship to other treaties***

A provision on this matter will not always be needed for multilateral treaties, and rarely for bilateral treaties. MOUs rarely include a similar provision. The Food Aid Convention of 1999 provides an example of this type of final clause in Article XXVI :

> “This Convention shall replace the Food Aid Convention, 1995, as extended, and shall be one of the constituent instruments of the International Grains Agreement, 1995.”

- ***Settlement of disputes***

It is common to find an article on settlement of dispute concerning the interpretation or application of bilateral or multilateral treaty. There are many precedents, although they tend to follow a certain pattern. *The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families of 1 990* provides a dispute settlement example in its Article 92:

"1. Any dispute between two or more States Parties concerning the interpretation or application of the present Convention that is not settled by negotiation shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration, the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

2. Each State Party may at the time of signature or ratification of the present Convention or accession thereto declare that it does not consider itself bound by paragraph 1 of the present article. The other States Parties shall not be bound by that paragraph with respect to any State Party that has made such a declaration.

3. Any State Party that has made a declaration in accordance with paragraph 2 of the present article may at any time withdraw that declaration by notification to the Secretary-General of the United Nations."

- ***Amendment and revision***

- It is common practice now. However in the past there was no tendency to think that far ahead. Today's multilateral treaties are so complex, and need too be adjusted to meet changes, that an amendment clause is usually essential.

- Amending a bilateral treaty is easier than having to amend a multilateral treaty, due to the fact that a bilateral treaty is one between only two parties. The parties would simply have to agree on the need to amend the treaty, and decide which form that amendment should take.

- Amending multilateral treaty is challenging and complex due to involvement of numerous parties therefore, it is considered essential to include effective mechanisms for amendment in most multilateral treaties.

Example : The Revised Treaty of Chaguaramas of 2001 provides in Article 236:

"1 . This Treaty may be amended by the unanimous decision of the Parties.

2. An amendment shall enter into force one month after the date on which the last instrument of ratification is deposited with the Secretariat."

- ***Status of annexes***

When treaty has an annex, it is normal to provide, though not necessarily in a separate article, that the annex is integral to the treaty (i.e. part of it). Article XVII of the Chemical Weapons Convention 1993 (CWC) provides an example of status of annex clauses :

> *"The Annexes form an integral part of this Convention. Any reference to this Convention includes the Annexes."*

There are often other documents produced at the time the treaty is adopted, such as agreed minutes, declarations etc., it is important to know whether they are integral part of the treaty or merely associated with it. Unless there is an expressed provision, the pressumption is that they are not.

- ***Signature***

- Treaties, especially bilateral ones, may not include a separate article on signature, as it is implied by the testimonium term, and signatures are not always required for their validity.
- But, most multilateral treaties have a specific article on signature. The formula chosen depends on whether the treaty will enter into force on signature or is subject to ratification.
- A treaty adopted within/under the Un, a UN specialised agency or other IOs usually provide :

This [treaty] shall be open for signature by [all States] and shall remain open for signature at [place] from [date] until [date].

- As indicated, the deadline is no legal requirement but might rather be political.
- Unless for in some treaties which are between only a small number of states, provided no parliamentary procedure is needed before the treaties enter into force for them all, it is less common for a multilateral treaty to enter into force on signature. Such a treaty usually provide :

The Agreement shall enter into force upon signature.

- ***Ratification***

- Ratification is required for a multilateral treaty, a normal provision would be as in Article 82 of the Vienna Convention while sometimes the sentence about the deposit of instruments of ratification is omitted. :

> The present Covenant is subject to ratification. Instruments of ratification shall be deposited with the [name of the depositary] .

- In bilateral treaties, usually the provision of following line in used :

> This [treaty] shall be ratified, and the instruments of ratification shall be exchanged at [place] as soon as possible .

- Sometimes, the article will provide for a procedure similar to ratification :

> Each Party shall notify the other of the completion of the constitutional formalities required by its laws for the entry into force of this Agreement.

- ***Accession***

- It is only relevant to multilateral treaties.
- It has the same legal effect as ratification and usually occurs after the treaty has entered into force.
- Those which are subject to ratification almost always include provision for accession and depending on the terms of accession article, a state will be able to accede after a specified date or a specified event or at any time.
- The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of AntiPersonnel Mines and on their Destruction of 1997 in its Article 16 provides an example of an accession clause:

> "1. This Convention is subject to ratification, acceptance or approval of the Signatories.
>
> 2. It shall be open for accession by any State which has not signed the Convention.
>
> 3. The instruments of ratifications, acceptance, approval or accession shall be deposited with the Depositary."

- ***Entry into force***

- With few exceptions, there will always be an express provision on entry into force.
- When there is none, it should implicit from the terms of the treaty when enter into force will take place.
- A treaty may enter into force, depending on the provisions of the treaty, on: A specified date; Signature; Ratification; Accession; or Any other terms as specified by the treaty.

- ***Duration, withdrawal or termination***

- It is typical for treaties to outline their duration, withdrawal procedures, and termination conditions unless the nature of the treaty makes such provisions unnecessary.
- In simple bilateral treaty the termination provision is often combined with other provisions like obligations .
- Examples of a duration provision :

“This Convention shall be of unlimited duration.”

“ This Agreement may be terminated by either Party by giving notice to the other through the diplomatic channel . It shall cease to be in force six months after the date of receipt of such notice”

- ***Provisional application***

- Provisional application clauses are not commonly included in treaty drafts due to their complexity and the potential complications they may introduce during negotiations and implementation.

- Provisional application clauses have been increasingly used in recent years for example in the Energy Charter and a number of arms control treaties, including the 1992 Chemical Weapons Convention and the Comprehensive Nuclear-Test-Ban Treaty (CTBT).

Article 45(1) of the Energy Charter Treaty provides that contracting parties agree:

“to apply this treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations”

- ***Territorial application***

- In bilateral treaty negotiations involving states with overseas territories, there may be a provision for extending the treaty to these territories, but such a clause is not necessary or common in multilateral treaties today.

- ***Reservations***

- They are found only in multilateral treaty , but not in all . When one is included, it may prohibit reservations :

“ No reservation may be made to this Convention ”.

- Alternatively, the clause will specify those categories of reservations which are permissible.

- An example of a reservation clause is provided by the Revised Treaty of Chaguaramas of 2001 in its Article 237:

“Reservations may be entered to this Treaty with the consent of the signatory States.”

- ***Depository***

- Depository clause is only necessary for a multilateral treaty .
- An example of a depositary clause is provided by Article 53 of the International Cocoa Agreement of 2001:

> “The Secretary-General of the United Nations is hereby designated as the depositary of this Agreement.”

- ***Registration***

- It is not legally necessary to provide that a treaty shall be registered, since under Article 102 of UN Charter there is already an obligation to do so.
- It is responsibility of depositary and it is normal to have a provision directing the depositary to register. The real advantage of such clause is as a reminder to the depositary.
- It is useful for bilateral treaty to have a express provision saying which party would register it. It is because all too many bilateral treaties are never registered, some times because each party assumes the other will do it.

7. TESTIMONIUM

- It is the Latin name for the last, formal party of a treaty beneath which the representatives sign.
- Some treaties omit the testimonium altogether, and this is not necessarily a problem as long as it is clear who has signed, where and when.
- A traditional testimonium will typically state, or consists the following :

In witness whereof the undersigned, being duly authorised thereto, have signed this [Agreement].
Done at [place], this [x] day of [month], two thousand and [year].

- These elements are essentially the same for (single instrument) bilateral treaties and for multilateral treaties.
- Sometimes, instead of ‘Done at’, a multilateral treaty may say ‘Opened for signature at’ , if it is to be open for signature for a specified period.
- Important element in testimonium, if they are not already provided for in the final clauses :
  - Authentic languages and
  - Number of originals

- ***Authentic texts***

- At some point a question may arise over whether the language in which treaty is published is one of the official language. If this is clearly set out in treaty itself, dispute of this kind are easier to resolve.
- The authentication process for a bilateral treaty is relatively simple : the treaty is between two countries of differing languages, this matter is usually addressed by providing that both languages are equally authentic.
- Multilateral treaties are often concluded in several equally authentic languages. It is best for there to be a formal procedure for adoption and authentication with regards to multilateral agreements.
- When treaty is done in more than one language, treaty text comprises all the authentic languages.

Bilateral - example of language specified in the testimonium :
DONE in two originals at London this 26th day of June 2006 in the English language only.

Multilateral - example of language specified in the testimonium :
Done at Warsaw, this 16th day of May 2005. in English and in French, both texts being equally authentic in a single copy which shall be deposited in the archives of the Council of Europe.

- ***Number of originals***

- It is essential to make clear on how many originals texts there are. Each original must be identical to any other and each must be signed by both/all parties.

- Example :

Done in duplicate [or Done in two originals] [in the x,y and z languages, each being equally authentic] at [place] on this [day] of [month] [year].

- Bilateral treaty is normally done in two duplicate as each side will keep a signed original.

- Some treaties expressly state that they are done in a single original .

- Where it is not stated how many originals there are, the natural presumption is that a multilateal treaty has only one original with all the signatures on it, which is kept by the depositary.

8. SIGNATURE BLOCKS

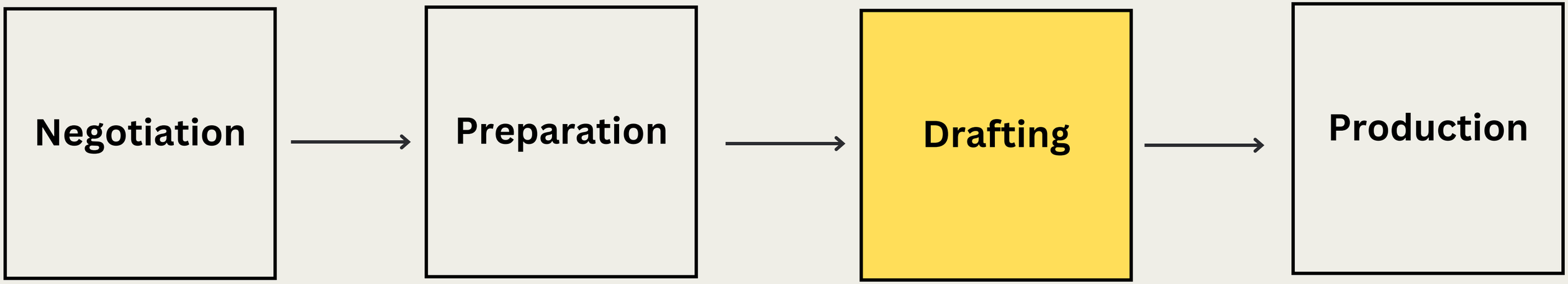
- Beneath the testimonium are the signature block . The signature block, marking the conclusion of the treaty-making process, is crucial therefore the representatives must pay attention to specifics like dates and signatory identification.
- The names of the States (and/or IOs) that are hoing to sign the treaty should be typed into the signature block.
- On a bilateral treaty, two States' names will be positioned according to custom precedence with one one to the left and on eon the right, or one above the other, alternating on each of the two originals.
- On a multilateral treaty, the names of the States (and IOs if any) singing the treaty will usually be listed in the alphabetical order.
- Any States or IOs who sign the treaty after it has been opened for signature, and whose name cannot therefore be added alphabetically, will add their signatures at the end.
- Multilateral treaties opened for signature should be produced with blank pages at the end for additional signatures.

9. ANNEXES (IF ANY)

- Annexes are sometimes used for reasons like to move a mass of technical details or long list of items out of the main text, avoid cluttering it and making it difficult to read.
- Annexes are normally placed. after the testimonium and signature block.
- It is also possible have annexes associated with a treaty that do not form a part of the treaty text, and are not intended to be binding, such as a programme of action.
- If annexes are intended to part of a treaty, they must always be linked to wording in an operative provision in the main body like, the UNCLOS contains the following provision headed ‘Status of Annexes’:

“The Annexes form an integral part of this Convention and, unless expressly provided otherwise, a reference to this Convention or to one of its Parties includes a reference to the Annexes relating thereto.”

MAKING A TREATY : PROCESS OVERVIEW



REFERENCES AND RECOMMENDED LITERATURE

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Thank You