

Welcome and Namaste !



Bilateral Treaty Negotiations: Negotiation skills and Strategies to Bilateral Scenario

(A brief presentation for Inter-action)

Madhab Paudel,
Independent Law Consultant,

General Views on Treaties

1. Unlike municipal law, the various methods by which rights and duties of States may be created, in international law they are relatively simple,

2. States transact a vast amount of their business by using the device of the legal instrument known as “treaty”
3. Treaties perform a variety of functions on international level that in national law are performed by many legal acts like constitution, parliamentary acts, Ordinance, rules, deeds etc.
4. There is no International Parliament as such, and international law is created on the basis of a treaty,
4. A treaty is basically an agreement between parties (basically states) on the international scene,
6. State cooperation extended, territory acquired, dispute settled, war terminated, alliance established under a treaty.

Meaning of a Treaty: What is a Treaty ?

1. Meaning of a Treaty under the customary International Law:

Treaty, is a binding formal agreement that establishes obligations between two or more subjects of international law (primarily states and international organizations).

2. Definition of a Treaty under the Modern Treaty Law : Meaning of the Modern International Law

3. Vienna Convention on Law of the Treaties, 1969 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 two or more related instruments and whatever its particular designation.

Hence, a Treaty is :

An Agreement,

- **Concluded between states,**
- **In written form,**
- **Governed by international law,**
- **Whether embodied in a single instrument or in the two or more instruments,**
- **Whatever its particular designation.**

Meaning of a Treaty: What is a Treaty ?

Vienna Convention on Law of the Treaties, 1969 does not address the existing treaty making practice of the world,

Vienna Convention on the Law of Treaties Concluded between States and International Organization and between International Organization, 1986 was concluded which further defines a treaty.

Nepal Treaty Act, 1990:

Agreement concluded between two or more states and between state and international intergovernmental organization.

A Bilateral Treaty is, basically, a treaty between two sovereign states.

It covers wide range of issues trade, defense, investment, extradition etc.

It is legally binding under International law.

Importance of a Treaty in International Law : Why

Treaties are concluded in International Level ?

Main source of international law.

Means of progressive development of int. law.

Constitution of an international/regional organization.

Means of cooperation among states.

Means of settlement of disputes.

Demonstration of international personality.

Transfer of capital and technology to the developing countries.

Treaty Making Procedures: Treaty Negotiations

1. Every state and only state has the capacity to make a treaty (VCLT art.6) and to conduct negotiations for a treaty, (subject of customary international law)
2. International intergovernmental organizations ,(but not NGO) may become a party to a treaty (subject of Modern international law) ,
3. A state or an organization authorizes a person to represent it in the negotiation or adoption of a treaty, it provides to the person a document known as “full powers”,
4. Certain categories of dignitaries may perform the treaty making job even without a full powers (Art.7,VCLT)
5. In case of a multilateral treaty the person’s credentials to the conference may serve a similar function of the full powers,
6. Nepal Treaty Act,1990 provides provision of Full Powers.

Negotiation Process and Negotiation skills of a Bilateral Treaty

Theoretically , Negotiations involve two or more parties who come together to reach some end goal that is agreeable to those involved.

One State proposes its position forward, while the other either accepts the conditions presented or counters with its own position.

The process continues until both parties agree to a resolution or negotiations break off without one.

Experienced negotiators try to learn as much as possible about the other party's position before a negotiation begins, including what the strengths and weaknesses of that position are, how to prepare to defend their positions, and any counter-arguments the other party will likely make.

The length of time it takes for negotiations to conclude depends on the circumstances.

Diplomatic Negotiation can take as little as a few minutes, or, in more complex cases, much longer,

The government delegations of two or more countries may take months or years to negotiate the terms of a major trade deal.(China-USA) (USA-Iran)

Meaning of treaty making process in regard to a Bilateral Treaty ?

The treaty-making process is made up of five broad stages:

- **Negotiations (Diplomatic)**, (host country prepares a draft for negotiations for a future treaty)
- **Signature,**
- **Ratification,**
- **Entry into force, and**
- **Implementation.**

Treaty Making Procedures: Treaty Negotiations

Mandate to the Negotiating Team (Delegation) for negotiations.

Once Mandate is clear, Certain Steps for Treaty Negotiations should be followed:

- **Preparation and planning:** what we want, what alternatives we have to the current deal, and what our counterpart might value and what will be the solution.
- **Definition of ground rules:** who ,where, when and how negotiations are being held
- **Clarification and justification:** both party will explain, clarify, bolster and justify their original position or demands.
- **Bargaining and problem-solving:** This is the essence of the negotiation process, where the give and take begins.
- **Closure and implementation:** Once an agreement has been met, procedures need to be developed to implement and monitor the terms of the agreement.

Negotiation Process : Various Steps and Strategy for Negotiations

1.Preparation,

- Expectation to gain the goal,
- Realistic approach of expectations,
- Possible compromises to make,
- Consequences arising out of deadlock of the negotiations

2,Exchanging Information,

3.Bargaining : (if negotiations are not successful)

4.Closing the Deal

Negotiations Strategy: Preparation and Stakeholders Consultations

1. Research/anticipate the counterpart's strategy, interests and constraints,
2. Consult domestic stakeholders (ministry, academicians, private sector, civic society)
3. Establish negotiation mandate and legal framework,
4. Develop negotiation strategy and plan and fallback position
5. Effective Negotiation strategy:
 - Build rapport and trust
 - Use issues linkage and package deals
 - Employ BATNA tactics (Best Alternative To a Negotiated Agreement)
 - Be flexible but protect own core interests

Setting Strategic Groundwork

- 1. Define National Interests and Priorities of the Country in the given treaty negotiation,**
- 2. Pay attention to the Government mandate in the given treaty,**
- 3. Identify negotiable and non-negotiable issues ,**
- 4. Understand counterpart's interests and priorities,**
- 5. Conduct risks-benefits analysis,**
- 6. Align with national and foreign Policy of the Nation.**

Treaty Negotiations skills: Strategy to get “ Yes” from other party

1. Treaty Negotiation Skills : bargaining skills and tactics for building trust while negotiating to reach an agreement, (diplomatic Negotiations)

2. Negotiation skills encompass back-and-forth communication designed to reach an agreement between two or more parties,

3. Treaty Negotiation is a strategic discussion between the representatives of two States to resolve an issue in a way so that both find acceptable.

Treaty Negotiation is a skillful job and Negotiating Team (Leader) must have certain skills:

- Good Listening,
- Effective Communication,
- Assertiveness,
- Flexibility

4. Successful negotiation usually involves compromises on the part of one or all parties.

Treaty Making Procedures: Treaty Negotiation Strategy

What is the Strategy of the Negotiating Team ?

- **1. Competitive Negotiations (To compete)**
- **2. Accommodative Negotiations (To accommodate)**
- **3. Avoidance of Negotiations (To avoid)**
- **4. Compromising Negotiations (To compromise)**
- **5. Collaborative Negotiations (To Collaborate)**

Treaty Making Procedures: Treaty Negotiations Strategy

1. Competing Treaty Negotiation is the **most aggressive approach**.

It describes a person who is inclined to be competitive, and it's usually used when the negotiating team wants to win at all costs.

2. The collaborative style of negotiation is the opposite of the competitive style.

It focuses on getting a win-win solution and encourages teamwork and collaboration

3. Compromise means giving up some of your position to get what you want.

It's a win-win solution that gets the best of both worlds.

Compromising is often the most effective way to avoid conflict, because it allows both negotiating teams to feel good for everyone involved.

Treaty Making Procedures: Treaty Negotiations Strategy

4. Avoidance is a good strategy if the team don't want to make a deal or when the team is not fully prepared.

Also, it's a good choice when the team is not interested to conclude a treaty.

It's result is not good and deadlock situation of Negotiations.

The Delegation has to consider consequence arising out of deadlock .

5. Accommodate gives in to get along with the other party.

One team gives something that is less important to obtain important or valuable.

Treaty Making Procedures: Treaty Negotiations Strategy

1. Normally, the host country prepares a draft for negotiations for a future treaty,
2. States may exchange drafts from both sides for negotiations,
3. When a bilateral treaty negotiations are concluded between the states/parties for one or more sessions and initial the text of the treaty,
4. States extending **financial cooperation** (bilateral loan of grant) have their standard form of Agreement,
USAID , CIDA, NORAD, SIDA, Saudi Fund, Kuwait Fund (Arabic text as authentic)
5. Certain standard clauses are not negotiable (known as **Boilerplate clause**),
6. Boilerplate clause is any written text that can be reused in new contexts or applications without significant changes to the original.

Treaty Making Procedures: Treaty Negotiations Strategy

Bilateral Negotiations in regard to particular issue is very crucial: (Tough Negotiations might be required)

Trade Agreement (Trade and Commercial Issue), (Transit issue in our context)

Investment : BITs , TIFA, BIPPA

Avoidance of Double Taxation ,

Extradition/Mutual Legal Assistance ,

Boarder Delimitation,

Natural resources/ Water sharing

Negotiation Process of a Bilateral Treaty

1. When negotiations are held successfully Text of a Treaty is adopted ,
- 2.The Text of the treaty is annexed to the “ Agreed Minutes”
3. *pactum de contrahendo or pactum de negotiando*
4. Initialing a Treaty,
- 5.*Signature ad referendum ,*
- 6.Evidence of intention to conclude a legally binding agreement even without concluding a treaty
- 6.When is a Treaty “ Concluded”?,

Strategy of Bilateral Treaty Negotiation for Legal and Institutional Framework

1. Ensure compliance with Domestic and International Law,
2. Use precise, clear, simple and enforceable language (to avoid doubt),
3. Involve technical experts and stakeholder Ministry for complex sectoral issues, (informal consultation)
4. Ask for technical support , if necessary,
5. Review legal and constitutional implications (consult with Law officer),
6. Plan and Design for Disputes Resolution (Diplomatic negotiations)

Adoption of Text of Treaty and Signature

1. Once a treaty is initialed or adopted the manner in which a state consents to be bound to it is usually indicated in the text of the treaty itself,
2. A bilateral treaty is signed by the representatives when Government approves the text of a treaty,
3. If there is no indication in the treaty for further steps after signature, then signature alone is sufficient to establish state's consent to be bound,
4. Certain category of treaties are subject to ratification by the contracting state in accordance with the constitutional and legal requirements, and merely signature is not sufficient to come into force,
5. Diplomatic negotiations will concluded for exchange of instruments of ratification,
6. Once a treaty comes into force, states start to implement it.

The End
Thank you very much!