# D O C U M E N T S  O F  D I P L O M A C Y

## A Drafting Manual



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## INTRODUCTION

Much of the diplomats formal occupation is taken up by the drafting - and reading- of documents. Although some of the documents of diplomacy will be drafted by specialists, the professional diplomat should, nonetheless have a certain professional facility for drafting all types of documents. For, an improperly drafted document may not only be incomprehensible, but it may also be open to misconstruction and manipulation.

Many of the documents of diplomacy have, in the course of a long period of time come to be perfected into what may be called 'standard form'. But many variations still exist even within these 'standard forms'. And, a certain amount of creativity is called for, even within these. Thus, for instance whereas the opening and closing paragraphs of a note verbale are standard, because of the diversity of diplomatic business, the intervening paragraphs which carry the substance of the note verbale cannot be standardized, and it is there that competence in communication plays a crucial role.

This manual is intended to serve two main purposes. Firstly, it will introduce the various documents of diplomacy, the purposes which they serve and the occasions in which they are

used. Secondly to go into the practical business of how the various documents should be drafted in order for them to effectively fulfill the purposes that they are intended to fulfill.

This manual is intended for those studying for the postgraduate diplomq in international relations at the Institute of Diplomacy and International Studies. It meets the needs of the drafting part of the paper on dipolmacy. It will also be useful for those students studying for an M.A. in international relations, and who have no practical diplomatic experience and for whom the practical aspects of diplomacy covered in this mannual would be a useful compliment to their more theoretical approach to the subject. Finally it is hoped that those diplomats already in the field will find the explanations of the rationale for the various documents of diplomacy mentioned in this mannual useful.

M. MWAGIRU
Institute of Diplomacy
and International Studies

Nairobi, 26 April 1990.

# PART I

# INTERNAL DOCUMENTS OF DIPLOMACY

## 1.0 INTRODUCTION

There are two main categories of documents of diplomacy, namely internal documents and external documents of diplomacy. Although the concern here is primarily with the external documents of diplomacy, it is useful to consider very briefly, the internal documents, their function and drafting.

Internal documents of diplomacy are those documents used in internal communication. The form and usage of these type of documents is largely governed by the different civil service practices in different countries, and it is therefore not possible to give an accurate standard rendition of each of them.

The four major internal documents of diplomacy are letters, memos, minutes and briefs. To these may be added telexes, although these can be either external, as when a telex is sent pending the arrival of credentials, or internal as in communication s between headquarters and missions, or between different missions of the same country.

CHAPTER 1

LETTERS

Like telexes, letters may be categorized as both external and internal documents. But, because external letters have a special form, that is the note verbale, our concern here will only be with letters as internal documents.

The Kenyan practice with regard to letters - and this is probably the practice throughout the Commonwealth, is that letters to Missions are addressed to the head of mission, and signed for the Permanent Secretary (by whatever title described). Conversely, letters from missions to headquarters are addressed to the Permanent Secretary and signed for the Head of Mission. The reasons for this is that the Permanent Secretary and the Heads of Missions are the administrative heads of the ministry and missions and therefore all the business of the ministry or the mission should be carried out in their name.

Letters are not addressed to any officials by name, but, to facilitate speed, they may be addressed for the attention of a particular official, or a particular section within the ministry.

Probably the most distinguishing feature of letters as

internal documents (at least in Kenyan practice) is that they bear no greetings at their commencement (Dear...) or at their end (yours faithfully etc.) This is the modern practice, which is very distinct from the now outdated practice of closing letters with ponderous phrases such as "your obedient servant, etc." This means that, once the subject matter of the letter is identified, one proceeds directly into substantive matters.

LETTERS

(i) The Permanent Secretary
Ministry of Foreign Affairs
P.O. Box 1001
RUANIA

Ref RUR/EMB/23 April 26, 1990

SIGNING OF AGREEMENT ON TRADE

Please refer to your letter ref. RUR/IA/00/2 dated 10 April 1990 in which you requested us to confirm when the above agreement may be signed.

The Basanga Foreign Ministry have informed us that their minister will travel to Ruania on 30 April 1990 for the purposes of signing the agreement on behalf of the People's Republic of Basanga.

J.R. MFANYAKAZI
for: AMBASSADOR

(ii) The Ambassador
Embassy of Ruritania
BASANIA

Ref. RUR/1A/00/2 April 17, 1990

SIGNING OF AGREEMENT ON TRADE

Your letter reference RU/EMB/23 dated 12 April 1990 refers.

Please inform the Basangan authorities that our minister for foreign affairs will receive the Basangan minister on 30 April 1990 for the purposes of signing the above agreement.

T.B. MSEMAWAZI
for: PERMANENT SECRETARY

## CHAPTER II

## MEMOS

Memos are communications within the ministry or between officials in the same department. They are used for the purpose of issuing instructions, forwarding reports, or giving opinions (such as legal opinions).

Memos, being internal documents, are written on unheaded paper. They do not contain greetings; instead they contain the name of the official writing it, the name of the official for whom it is intended, the reference (file) number, the date, and the subject. At the end of the memo is the name and official designation of the official writing the memo.

Although ..... shows a general format for memos, practices in different bureaucracies may differ somewhat. Thus, in some bureaucracies, no actual names of officials are included in the memos. This practice can only be explained as being a product of stiff bureaucracies where officials are unduly mindful of their official rank. It is a ponderous practice with little relation to reality, since, even in formal conversations within the ministry or departments, officials don't usually address each other by title.

## CHAPTER III

## MINUTES

Although in colloquial terms 'minutes' are usually substituted for memos, it is useful to consider the two types of 'minutes', one of which explains this confusion.

### 1.3.1 Minutes as Memos

Once a memo as we have explained it above is written, the addressee may respond to it. This may be done in one of the three ways depending on the circumstances. It may be noted, thus closing that communication. It may be responded to on its face; or it may be responded to by way of another memo. Where it is noted or responded to on its face, that response is strictly speaking referred to as a minute. This will normally happen when the response is brief. Where the response is longer, a fresh memo is written, with the rules on writing memos applying.

### 1.3.2 Minutes Proper

The diplomat however will probably be more interested in minutes proper. These are records of meetings. They may be formal as when a record is kept of a formal meetings, or they may be informal as where a note is kept of conversations held in the office.

In the latter case, the minutes are informal, and are usually headed as a 'note for the file'. These enable conversations, especially with other (foreign) diplomats to be recorded. They may also be records of telephone conversations, which the conscientious diplomat will always note and record, to serve as a guide and a future record. Although there is no particular format for these, the practice of keeping a record of conversations etc is one that must be cultivated.

Minutes proper are formal records. They should faithfully report the relevant conversations that take place during a meeting. They should, essentially, put the reader in as good (or almost as good) a position as if the reader had actually attended the meeting.

MEMOS

INTERNAL MEMO

To: D.D. MDOGO DATE: 6 April 1990

From: F.B. KUBWA REF: RUR/MFA/07

SUBJECT: INSTRUMENT OF RATIFICATION: LAW OF THE SEA

1. The Government of Ruritania has undertaken to ratify the U.N. Convention on the Law of the Sea (see folio 20)

2. Please draw up the necessary instrument for the Minister's signature and keep me informed.

F.B. KUBWA
HEAD,
LEGAL DEPARTMENT

(ii) INTERNAL MEMO

To: F.B. KUBWA 8 April 1990

From: D.D. MDOGO REF: RUR/MFA/08

SUBJECT: INSTRUMENT OF RATIFICATION: LAW OF THE SEA

1. Your memo dated 6 April 1990 refers

2. I attach herewith the necessary instrument of ratification for forwading to the Minister.

D.D. MDOGO
LEGAL OFFICER
LEGAL DEPARTMENT

## CHAPTER IV

## BRIEFS

Briefs can best be described as the tools of trade of the diplomat. Whether engaged in the day to day conduct of diplomacy or whether engaged in negotiating, the diplomat must be able to produce briefs, and to operate from briefs. There are two broad categories of briefs: the situation briefs, and the negotiating briefs. Each of these is an important document of diplomacy and an essential component in the conduct of diplomacy, whether bilateral or multilateral.

### 4.1 Situation Briefs

Situation briefs are, in general technical briefs. These are required in various instances. They may be required when the Foreign Minister (or any Minister) or the Head of State is visiting a foreign country or receiving a foreign counterpart. In these instances, situation briefs should say something about the country being visited, or about the country of the visiting official. They should essentially emphasize those aspects (e.g. of economics, trade etc) which the country should emphasize on in its relations with the country being visited or whose official is being received. These briefs, although general, should point out to areas of mutual benefit which should be raised in discussions. Their thrust should depend upon the directions of policy. Above all, even though general, they should be accurate. They should

be fashioned according to the occasion that gives rise to their necessity.

Situation briefs may also be of the kind where they are required for the purposes of shaping future policy. These are for instance briefs written upon arrival at a new post - or a recently opened mission. This type of situation brief will give an account - through the new diplomat's eyes . of potentials for cooperation, exploitation, and mutual benefit. They should summarize the objectives that the new mission will hope to achieve. They are not a litany of historical or other data. They should be an assessment of live issues, and should, above all, be creative.

## 4.2 Negotiating Briefs

It can be said without exaggeration that the quality of negotiating briefs reflects the quality of effectiveness during negotiations, be they bilateral or multilateral. Negotiating briefs are signposts along the way, pointing out the directions which the negotiator should follow, and bringing him back to the 'straight and narrow' path.

There are two main types of negotiating briefs: individual negotiating briefs, and composite negotiating briefs. Composite Negotiating briefs outline the general approach of the country to the matters being negotiated. They reflect the thrust of policy, and the goals intended to be achieved. They are general because

they do not go into minute detail. They reaffirm the country's policies and positions and the means by which these will be achieved and supported. These briefs are a necessary requirement for both bilateral and multilateral negotiations.

Individual negotiating briefs on the other hand are an outline of the approach of the department from which the various participants come from. Although these are more personal, they should be broadly guided by the policy of the general negotiating briefs. They will outline the positions to be taken on each item on the negotiating agenda; they will point out the latitude which the negotiator will consider it necessary to take in order to meet the requirements of general policy, in the face of many other positions. The individual negotiating brief will point out and explain the bottom positions that can be taken on any one issue. It will also suggest alternatives which may require to be taken in order to arrive at an agreement, or a consensus.

The individual negotiating brief - if well presented may shape policy. It will suggest the latitude to be given to the negotiator, and if a good brief, it will give a lot of flexibility to the person negotiating. It has been suggested that in modern times with the advent of modern technology the individual negotiating brief is no longer necessary - or at least, no longer as important as it used to be in pre-technology days. But this is not necessarily the case. Even in the modern

age, and with the most advanced technology, the quality of the individual diplomats negotiating brief will reflect the contribution to his country's diplomacy.

However, for a brief to be useful, it must have a mandate. The brief should be addressed via a memo to those who make decisions. For, once officially approved, a brief is a powerful instrument in the hands of the negotiator. It gives him the confidence to speak on behalf of his country. And, a good brief obviates the need for constant consultations. The art of writing a good brief is therefore a basic and important tool for the diplomat engaged in negotiations.

It is worth remembering however that negotiating briefs, of whatever description are internal documents, and are therefore confidential. When once revealed to the negotiating interlocutors, the whole basis for negotiation is lost, and thus having no negotiating power, a person may negotiate for many days - and achieve nothing.

# PART II

## EXTERNAL DOCUMENTS OF DIPLOMACY

## INTRODUCTION

External documents of diplomacy are an important component in the day to day conduct of diplomacy. They are useful complement to the other activities of diplomacy such as formal negotiations, formal meetings and informal contacts. Indeed, they provide a record of the activities of diplomacy, in all their complexities.

In order to understand the wide and diverse nature of diplomatic activities requiring formal documentation, it is proposed to classify the external documents of diplomacy into the following categories:

1. Document of communication
2. Empowering Documents
3. Documents of Courtesy
4. Enabling Documents
5. Documents of Negotiation

It should be noted at the outset however, that this is a working classification and not a rigid one. It serves to help in analysis; some of the documents in one category could, with equal justification, belong to another, and it may be difficult to justify why some documents have been classified here in one category and not the other. To such questions, one can only get comfort in the knowledge that diplomacy is not an exact act, and that in any event, strange things indeed do happen in the world



of diplomacy.

## CHAPTER V

## DOCUMENTS OF COMMUNICATION

5.0 By documents of communication is meant those documents through which the day to day business of the foreign office and of the mission are carried out. In the world of diplomacy documents of communications are those which in other areas of the civil service are known as letters. But there are various types of letters in diplomatic practice, the most important being note verbales, aides memoires and letters *per se*.

### 5.1 NOTE VERBALE

The note verbale is the most commonly used document of diplomacy. Much of the formal communication of the foreign office and of the mission is conducted through the medium of the note verbale. Unlike some other documents of communication such as the *bout de papier* (see below) the note verbale is strictly official document. It must be typed on official paper and contain the official stamp of the foreign office or diplomatic mission. The official stamp must also be initialled by a diplomatic official.

As with most other external documents of diplomacy, the

format of the note verbale is standardized. A simple note verbale would have three main components or paragraphs the opening paragraph, the body or substantive paragraph, and the closing paragraphs. The opening and closing paragraphs are formal, and it is in the body that the note verbale carries its message.

## 5.2 The Opening Paragraph

The opening paragraph should carry the formal compliments, the acknowledgement and the introduction. Thus it might read as follows:

> (The Ministry of Foreign Affairs of the Republic of Ruritania presents its compliments to the Embassy of the Peoples Republic of Basanga), [and has the honour to acknowledge receipt of the latter's note Ref RR/001/5 dated 5 January 1994], and would like to inform the Embassy of the Peoples Republic of Basanga as follows:

The first part of this paragraph contained in round brackets is the formal presentation of compliments. The second part contained in square brackets is the acknowledgement part; it acknowledges an earlier note verbale received, and states its reference number. Of course, this part is unnecessary where there is no earlier note verbale being acknowledged or referred to. The last part of the paragraph (not bracketed) introduces the response to be given, or the message intended. Of the three parts of the opening paragraph, the first and the last are always essential; the second depends on the circumstances and the state

of correspondence. The last part of the paragraph may differ, according to the style, but in whatever style it is couched it should carry the same message.

Thus, an opening paragraph, which is not referring to any earlier correspondence would read.

> The Ministry of Foreign Affairs of the Republic of Ruritania presents its compliments to the Embassy of the Peoples Republic of Basanga "and would like to inform the Embassy of the Peoples Republic of Basanga as follows"

The part in inverted commas could also read: "and has the honour to inform...."

Or: "and would like to bring the following matter(s) to the attention of the Embassy of...."

This last variation is usually most suitable when the subject is one of protest, or warning, as for instance, in the above example, where the Embassy of Basanga or its officer(s) has been in breach of some law, rule or regulation.

Thus, a typical opening paragraph of a note verbale would read as follows:

| | |
|---|---|
| Compliments: | The Ministry Foreign Affairs of the Republic of Ruritania presents its compliments to the Embassy of the Peoples Republic of Basanga, |
| Acknowledgement: | and has the honour to acknowledge receipt of the latter's note Ref RR 001/5 dated 5 January 1990, |
| Introduction: | and would like to inform the Embassy of the Peoples Republic of Basanga as follows: |

5.3 " The Substantive Part

The substantive (second) part of the note verbale states the subject of the note verbale. It contains no preliminaries (these having been included in the opening paragraph) It goes right into the subject, and it should be precise.

The body of the note verbale need not be restricted to one paragraph. Depending on the subject matter, it may run to two or more paragraphs. Where more than one subject is dealt with, it is better to introduce each new subject in a new paragraph.

Supposing that the Embassy of Basanga had, by an earlier note written requesting that a trade delegation from their capital be received in Ruritania for bilateral talks: the paragraph would read:

The Body: The Ministry of Trade of the Republic of Ruritania has agreed to host a trade delegation from the Peoples Republic of Basanga during the second week of March, 1990, preferably between the 12th - 14th. The Ministry also considers the agenda proposed for discussion to be acceptable.

Further additions may be included in the same (but preferably a different paragraph) thus:

> The Ministry of Foreign Affairs of the Republic of Ruritania would appreciate it if the Embassy of the Peoples Republic of Basanga could confirm that the above dates are suitable.

## 5.4 The Closing Paragraph

Like the opening paragraph, the closing paragraph of a note verbale is formal and standardized. It contains no information of a substantive character. The closing paragraph of the note verbale above would read:

> The Ministry of Foreign Affairs of the Republic of Ruritania takes this opportunity to renew to the Embassy of the Peoples Republic of Basanga the assurances of its highest consideration.

## 5.5 Other Details

Because of its formal nature, a note verbale is always written on formal headed paper. It is always written in triplicate (one original and two copies). The original and one copy (also stamped and initialled) are sent to the mission or the office concerned, with one copy remaining as a file or office copy.

A note verbale must also contain the date. The date is written on the bottom left side, immediately after the closing paragraph. Below the date is the address of the office where the note is destined. On the bottom right side is the official stamp, which must be initialled.

LETTER

NOTE VERBALE No. 001/90

The Ministry of Foreign affairs of the Republic of Ruritania presents its compliments to the Embassy of the Peoples Republic of Basanga, and has the honour to acknowledge receipt of the latter's note No. RR 001/5 dated 5 January 1990, and would like to inform the Embassy of the Peoples Republic of Basanga as follows:

The MInistry of Trade of the Republic of Ruritania has agreed to host the proposed trade delegation from the Peoples Republic of Basanga during the second week of March 1990, and preferably between 12-14 March. The Ministry also finds the proposed agenda acceptable.

The Ministry would appreciate it if the Embassy of the Peoples Republic of Basanga could confirm that the above dates are suitable.

The Ministry of Foreign Affairs of the Republic of Ruritania avails itself of this opportunity to renew to the Embassy of the Peoples Republic of Basanga the assurances of its highest consideration.

STAMP

Date

Embassy of the Peoples Republic
of Basanga
Ruania 27-22.
Ruania.

## 5.6 AIDE MEMOIRE

An aide memoire is a less formal note than a note verbale, and is used for different purposes and in different ways. It is, in its essence, s written support for verbal communications.

Perhaps the most common use of an aide memoire is as a follow up to matters which have already been formally raised in other communications, or through other channels. In those circumstances the diplomat will visit the relevant office in his country of accreditation and verbally discuss the issues at hand. To safeguard against the matters discussed being forgotten, he will leave behind in a summary form, the points raised. This summary of the issues raised will be in the form of an aide memoire. The recipient of the aide memoire should retain it and file it for follow up, under cover of a memo reflecting his understanding of the discussion.

### 5.6.1 Aide Memoire vs Verbale

Unlike a note verbale, an aide memoire contains no references and also has no salutations either at its beginning or at its end. It is also typed on plain paper, containing a coat of arms, but no letterheads. An aide memoire will also not carry an official stamp, and will consequently not be initialled; but is will carry a date.

### 5.6.2 The Format

An aide memoire carries a heading at the top of the page identifying it as such. It is best written in 'point' form, with. no preliminaries, and the extent of detail will depend on the intricacy of the subject being dealt with.

There is no particular rule of practice as to when the aide memoire should be handed over, but it is probably best to do so after the discussion and after the points raised in it have been brought out verbally.

### 5.6.3 The Legal Status of an Aide Memoire

There is little or no literature explaining the legal status of an aide memoire. A theoretical question that might arise is what weight should be attached to an aide memoire, for example during bilateral negotiations. This question is important particularly because of the semi-official nature of the aide memoire itself. Can the aide memoire be treated as binding on the party from whom it originates?

The best view to take is that an aide memoire should not be treated as binding during negotiations. To borrow a concept from municipal law, it should be considered to be a document written 'without prejudice' and as such should not be considered legally binding.

COAT OF ARMS

~~NO LETTERHEADS~~

# AIDE MEMOIRE

1. At the proposed trade talks between the Republic of Ruritania and the Peoples Republic of Basanga, the matter of the carriage of horticultural cargo from Basanga to Ruritania will be a main agenda item.

2. As per the existing bilateral air services agreement between the two countries, Ruritania Airways should carry 30 tons of horticulture northwards from Basanga, twice a week. This horticultural load is for the consumption of Ruritania (63%) and utopia (42%).

3. Ruritania Airways is currently carrying 18 tons of horticulture. Therefore 12 tons of Basanga horticulture is not freighted, causing a great loss to Basanga.

4. Utopias Airlines have on principle agreed that they can help Ruritania Airways to ferry the 12 tons, provided that Ruritania Airways is willing to enter into a joint agreement with Utopia Airways on the subject.

5. This would mean a reduction of the frequency of Ruritania Airways to Basanga from the present twice weekly to once weekly.

21 January 1990

## 5.7 LETTERS

As we observed earlier, the note verbale is the most common form of and indeed the quintessence of diplomatic communication. However, there exist instances where it is not the proper form of communication, and where the letter is used instead. These are instances where heads of missions may wish to communicate to each other, or ministers may wish to communicate with heads of missions in a more personal way, but outside the confines of the official note verbale. This is done by letter.

### 5.7.1 The Form

This type of letter shares some features of the note verbale, and those of a normal letter. These letters are however official documents, and as such are always written on official letterheads.. Unlike note verbales these letters have no formal opening paragraph. And, unlike internal letters they address the head of mission in his official capacity. Thus, they would read: "Your Excellency" or "Dear Mr. Ambassador/High Commissioner". This address may be typed, but is normally handwritten, in order to impart a personal element into it.

At the close of the letter, it is normal to have a formal salute, borrowed closely from the form of a note verbale. Thus, such a letter would close in the following way:

"Accept, Your Excellency, the assurances of my highest

consideration."

The signatory of the letter will also close the letter in one of the common forms, such as "Yours sincerely" etc. and also mention his official status, or designation.

### 5.7.2 The Use of Letters

Although the letter as an external document of diplomacy is used in more personalized communications between heads of mission or between ministers and heads of mission, the proliferation in the actors of modern diplomacy has expanded the category of persons for whom the letter is the formal and legitimate form of communications.

Although for most of the actors of diplomacy outside diplomatic missions and the specialized agencies, the common letter is the usual form of communication, the form of letter under discussion is suitable in communications between foreign ministers, heads of missions and the heads of inter governmental organizations. Outside this specific category of people, communication between foreign offices or missions to intergovernmental organizations (and vice versa) will take the common form of letter, since such organizations, not being primary actors of diplomacy, cannot properly have recourse to the note verbale.

### 5.7.3 Heads of State

Heads of State or Government regularly communicate through letters. At their most formal, these letters are on formal paper, carrying the coat of arms and the official address of the sending Head of State. They commence by use of the formal title: "Dear Mr. President" or "Dear Prime Minister" and end with the official title and designation of the sending Head of State or Government.

Although there is again no formal rule, as to the address, common practice is to write the address of the head of state to whom the letter is addressed on the bottom left side corner of the letter, after the signature of the addressor. Also, as these letters are delivered by hand, they bear no postal addresses etc. Instead, the official office will suffice.

Letters

H.E. Pole Kazibado,
Minister for Foreign Affairs
Ruania
Ruritania

Your Excellency,

Further to our discussions in Utopia on the subject of a Heads of State Summit, I have been able to confirm that our president will be willing to travel to Ruania on 20-22 April 1990 for the summit. I have instructed my Chief of Protocol to liaise with yours on the details.

Accept, Your Excellency, the assurances of my highest consideration.

Yours Sincerely,

John Mpango
Minister for Foreign Affairs

date

## 5.8 BOUT_DE_PAPIER

The bout de papier (literally 'piece of paper') is the least formal of all diplomatic documents of communication. It is not an official document. Its normal use is when broaching a subject with no official sanction to it, or when a communication is being made which in formal terms is not official or is prohibited.

### 5.8.1 The_Form

Not being an official document (and often not even officially sanctioned) the bout_de_papier is written on a piece of paper which bears no official markings; and could even be written on an ordinary scrap of paper. The bout__de_papier does not require to be typed, and bears no address and no signatories. If the bout_de__papier appears to be rather surreptitious, that may only be no more than a reflection of its lowly status amongst the diplomatic documents of communication, and also because it can be denied with the same facility as it was written.

## CHAPTER VI

## EMPOWERING DOCUMENTS

### 6.0 INTRODUCTION

Even though much of diplomacy is conducted in an informal manner, the rules of diplomacy require that officials conducting diplomacy be formally empowered to do so by their respective states. Where such formal empowerment is not given, officials do not enjoy all the rights and privileges usually accorded to fully accredited representatives, and in some cases they may be completely disabled from performing official functions as representatives or on behalf of their States.

Empowering documents are aimed at giving official sanction to heads of missions or consuls to take up their posts; empowering delegates to attend and participate at meetings or to sign treaties on behalf of their States.

Although the rules relating to the empowering documents of diplomacy are covered at length in both diplomatic and treaty

law, we shall not concern ourselves with these except insofar as

they are incidental to the requirements of drafting them, which is one of the tasks of the diplomat.

It is worthwhile to bear in mind that the form - and the content of empowering documents of diplomacy (as indeed with all external documents of diplomacy) has evolved over many generations, and is therefore not static. However, current forms have evolved to suit current moods, to suit modern trends and needs. But, by and large, the modern trend in drafting documents of diplomacy is towards brevity and precision. Old forms except where they are still in use (e.g. in the United Kingdom) have in modern times been whittled down, so that only their bore and pertinent essentials remain.

## 6.1 CREDENTIALS: AMBASSADORS

It is not intended here to go into the provisions of the Vienna Convention on Diplomatic Relations, save to note that the presentation of credentials is essential before a newly accredited head of mission effectively takes up his functions in the receiving State.

### 6.1.2 The Form

By their very nature, credentials are weighty and solemn documents. They must be signed by the Head of State. A typical credential will contain five basic elements: the Address and greetings; and affirmation of good relations; a statement of the

sending Head of State's faith in his choice of ambassador; a request that the ambassador be given credence, and a reassurance of esteem.

### 6.1.3 The Greetings

The name of the sending Head of State and the receiving Head of State followed by a statement of greetings precede the substance of credentials. Thus the beginning of credentials might read:

> XYZ (Names)
> President of the Republic of Ruritania
> To His Excellency
> ABC
> President of the Peoples Republic of Basanga
> SENDETH GREETINGS!

Although the first part of the credentials may differ in format from country to country, the information contained therein must always be the same. It must state the names (and formal titles in some countries) of the sending Head of State, and the name of his country. It should also contain the names (but not other titles) of the receiving Head of State, and his country. The greetings ( Sendeth Greetings!) are standard to all credentials whatever format is adopted.

The form of address preceding the substantive part of the credentials may vary but the form 'Great and Good Friend' is common in many countries, but some variation of that form will be acceptable, such as 'Great and Good Brother' etc.

### 6.1.4 Statement of Good Relations

The first substantive paragraph of credentials will recall the good relations between the two States, and embody a wish that these should be continued. It will also reveal the name of the person who has been chosen as the ambassador. Although this is also a standard requirement, there may be variations in form. Thus the first paragraph, with variations in brackets may read:

> Being desirous to maintain, without interruption, the relations of friendship and good understanding between (the Republic of Ruritania and the Peoples Republic of Basanga) (our two countries), I have chosen John Fidel SEMAMINGI to be Ambassador Extraordinary and Plenipotentiary of the Republic of Ruritania in the Peoples Republic of Basanga.

### 6.1.5 Statement of Confidence

The second substantive paragraph will embody a statement of the confidence in the ability and integrity of the person chosen to be ambassador. Here again the choice of words may vary, but the essence will remain the same. Thus the paragraph might read:

> The personal qualities of John Fidel SEMAMINGI give me entire confidence that he is eminently worthy of the high office for which he has been chosen, and that he will discharge the duties of that office in such a manner as will ensure your Excellency's Approbation and Esteem.

or a variation thereof:

> The experience which I have had of John Fidel SEMAMINGI's talents and zeal for my service assures me that he will discharge the important duties of his mission in such a manner as to merit

your approbation and esteem, and to prove himself worthy of this new mark of my confidence.

6.1.6 Request to Give Credence

The third and usually the final paragraph of credentials is probably the most important part. It reiterates the fact that whatever the new ambassador may say, will be said in the name of his government: and to speak on behalf of his Head of State is indeed the whole and true essence of accrediting an ambassador in a foreign country. Again here, the style may vary, but the essence of the wording and its thrust remains the same.

> I therefore request (Your Excellency to) that you will receive him favourably, give entire (full) credence to what he shall (say on my behalf) ( and on behalf of the Republic of Ruritania) (communicate to you on my behalf) (and especially when he shall express to Your Excellency my best wishes for your Good Health and for the prosperity of the Peoples Republic of Basanga) (and especially to the assurances which I have charged him to convey to you of my best wishes and those of My Government for the prosperity of the Peoples Republic of Ruritania).

The termination of credentials is preceded by a phrase of prayer, whose form may vary according to style. Thus is may end:

> May God have Your Excellency in His wise keeping,
> or
> I commend Your Excellency to the protection of the Almighty.

or some such phrase. Before the signature, the credentials may end with some such phrase as "Your Good Friend", "Your Brother" etc.

6.1.7 Other Details

Credentials are written on official paper with only the national crest at the top, and no addresses. It may contain the date and the capital from which it is sent, immediately preceeding the signature. However the more modern form is to have the date and the name of the capital on the bottom left hand corner of the paper.

(Credentials: Ambassador )

James Monomotapa
President of the Republic of Ruritania

To His Excellency
Joshua Mwana wa Mberi
President of the Peoples Republic of Basanga

SENDETH GREETINGS!

Dear and Good Brother,

Being desirous to maintain, without interruption the relations of friendship and good understanding between the Republic of Ruritania and the Peoples Republic of Basanga, I have chosen John Fidel SEMAMINGI to be Ambassador Extraordinary and Plenipotentiary of the Republic of Ruritania to the Peoples Republic of Basanga.

The personal qualities of John Fidel SEMAMINGI give me entire confidence that he is eminently worthy of the high office for which he has been chosen, and that he will discharge the duties of that office in such a manner as to merit Your Excellency's approbation and esteem.

I therefore request Your Excellency to receive him favourably, and to give full credence to what he shall say on My behalf and on behalf of the Republic of Ruritania, and especially when he shall convey to Your Excellency My best wishes for Your Excellency's good health and for the prosperity of the Peoples Republic of Basanga.

I commend Your Excellency to the protection of the Almighty.

Your Brother,

signed

Date

C. Wilcox

## 6.2 CREDENTIALS: DELEGATIONS

Delegations to international conferences require to have with them - and to produce - documents showing that they are officially empowered to represent their various States at those conferences.

Although our main concern here is not with the law of credentials, it is necessary to bear in mind that non-production of credentials disables a delegate in various ways, not least of them being that such delegate cannot vote, and enjoys merely the status of an observer.

At international conferences, there exists a credentials committee, which is charged with the task of scrutinizing the credentials of all delegates and reporting back to the plenary. It is therefore of utmost importance that not only do delegations carry with them the requisite credentials, but that these also be in due form.

### 6.2.1. Authority

Credentials are given under the name of the Chief Executive: but they may also be given under the hand of the Minister for Foreign Affairs, or someone acting on his behalf and duly

authorized to do so. Powers purported to be signed by any other authority will be void.

### 6.2.2. The Form

The modern trend with regard to documents of diplomacy of this nature is towards brevity and precision. Thus, credentials for delegations will identify the person under whose authority they are issued; the person and purpose to whom they are issued; identify advisors and alternates (if any); and they will also carry the date on which they are issued the signature of the person issuing then and the official seal of the issuing State.

Thus credentials can be substantively done in a single paragraph which carries all the requisite information. Thus, credentials authorizing the Minister of Fisheries of Ruritania to attend the second preparatory commission meeting of the Law of the Sea would have several distinct conceptual parts. The first part would read:

> I, XYZ, President of the Republic of Ruritania DO HEREBY CERTIFY that the Honourable ABC, Minister for Fisheries of the Republic of Ruritania.

This first part identifies the name and station of the assuring authority, in this case the President. The full names should all be there, and not merely initials and the surname. Secondly, this first part identifies by full name and office, the person to

whom the credentials are being issued.

6.2.3. Statement of Power and Purpose

The second part of the credentials should contain an express authorization stating that the person named has been given the authority to be a delegate or to lead a delegation to the conference. It should also state what conference he is being authorized to attend, and the dates of the conference. This part might therefore read:

> ....Is by these presents given FULL POWER AND AUTHORITY (to lead the delegation of the Republic of Ruritania) ( to represent the Republic of Ruritania) (at) the Second Preparatory Commission of the Law of the Sea Conference to be held in Kingston, Jamaica from 2-10 May 1990.

6.2.4. Date, Seal and Signature

Where there is a sole delegate, the credentials will be dated, include a statement that they are given under the official seal of the issuing State, and be duly signed. This is done in two paragraphs. Thus it may read:

> IN WITNESS WHEREOF, (I have signed these presents and affixed hereto the seal of the Government of the Republic of Ruritania) ( I have hereto set my hand and caused the seal of the Republic of Ruritania to be affixed hereto).
>
> DONE IN Ruania this 1st day of May 1990.

The choice of the format to use (i.e. choice of words in brackets) is a matter of style and practice. Indeed both sentences could be merged into one:

IN WITNESS WHEREOF these presents are given under my hand and the official seal of the Republic of Ruritania this 1st Day of May 1990.

The official seal appears on the bottom left; the signature appears on the bottom right:

SEAL

(signed)
(PRESIDENT OF THE REPUBLIC OF RURITANIA)
(MINISTER OF FOREIGN AFFAIRS OF THE REPUBLIC OF RURITANIA)

6.2.5. Deputy, Alternates and Advisers

Where there is more than one delegate (i.e. where there is a deputy leader, alternates and advisers) then their names, official ranks and designations appear immediately after the first paragraph:

FURTHER, I, XYZ, DO HEREBY CERTIFY that the Honourable ABC, will be accompanied to (the above conference) (the said conference) by the following persons:

1. H.E. FGH
Ambassador of Ruritania
to Jamaica — DEPUTY LEADER

2. Mr. JKL
Head, Legal Department
Ministry of Foreign Affairs
Ruritania — ALTERNATE

3. Mr. MNP
State Counsel,
Office of the Attorney General
Ruritania — ADVISER

4. Mr. RST
Head, Department of Mines
Ministry of Fisheries
Ruritania — ADVISER

Although practice may differ from country to country, it is usual for the names of delegates from government departments/ministries, to precede those of delegates either from the private sector or from departments outside the formal structure of government (e.g. from universities, from parastastals etc.)

(Credentials: Delegates )

CREDENTIALS

I, JAMES MONOMOTAPA, President of the Republic of Ruritania DO HEREBY CERTIFY that the Honourable Amos NEBUCHADNEZER, Minister for Fisheries of the Republic of Ruritania, is by these presents given FULL POWER AND AUTHORITY to represent the Republic of Ruritania at the second Preparatory Commission of the law of the Sea Conference to be held in Kingston, Jamaica from 4-10 January 1990.

IN WITNESS WHEREOF, I have signed these presents and affixed hereto the seal of the Government of the Republic of Ruritania.

DONE in Ruania this 2nd Day of January 1990.

seal signed

PRESIDENT OF THE REPUBLIC OF RURITANIA

## 6.3. FULL POWERS

Credentials to attend a conference do not in themselves authorize the delegate named therein to sign any treaties that may result from the deliberations of the conference. To enable such a delegate to sign a treaty on behalf of his country he needs a different and separate authorization known as full powers.

In the multilateral forum, delegates to a conference of plenipotentiaries or to a diplomatic conference, if they are to sign the resultant treaty, must posses full powers, which must be in proper and due form. It is important that such a person carry full powers (ie the authorization to sign on behalf of his country) because, even though under the law of treaties signature has a different legal status from ratification, nevertheless signature of a treaty imports certain legal obligations on the State which signs but has not ratified a treaty. For this reascn, a signature to a treaty may only be appended on the strength of formal instructions to do so.

In the bilateral forum, State practice differs on the necessity to produce full powers before signature of an agreement. But many jurisdictions still require that the signature to a bilateral agreement be evidenced by full authority to sign.

But, whatever the case, since signature binds a State perform (to refrain from doing) certain actions, the authority to sign a treaty must be given by the highest authority in the land. The Law of Treaties Convention recognizes this authority as being either the Head of State, or the Minster for the time being in charge of Foreign Affairs.

### 6.3.1 THE FORM

Full powers need not be contained in a highly elaborate document. It is sufficient that full powers should clearly state the players involved, ie the person issuing the powers, and the person to whom powers are being issued:

> I, XYZ (full names) President of the Republic of Ruritania) (Minister for Foreign Affairs of the Republic of Ruritania) DO HEREBY invest) (have invested) (His Excellency, ABC, Ambassador Extraordinary and Plenipotentiary of the Republic of Ruritania to the Peoples Republic of Basanga) (The Honourable DFH, Minister for Fisheries of the Republic of Ruritania).

The Authorization/Power

The second part of the full powers is the most important. It expressly states that the named person is actually given the authority and the power to sign. Whether the power is given to sign a bilateral agreement (below, square brackets) or a

multilateral agreement (below, round brackets) the form will be more or less the same.

> With FULL AND ALL MANNER OF POWER AND AUTHORITY, for, and in the name of the Republic of Ruritania [to sign the Agreement on Scientific and Cultural Cooperation between the Government of the Republic of Ruritania and the Government of the People's Republic of Basanga] (to sign the Law of the Sea Convention opened for signature on 12 January 1990 in New York).

Date, seal and signature

The date, seal and signature appear in the same style as they do in credentials (or in other documents of a like kind). Thus the last part of the full powers would read:

> [Given under my hand and the seal of the Government of the Republic of Ruritania this 2nd day of May, 1990]
>
> or
>
> (IN TESTIMONY WHEREOF I have herewith set my hand and caused the seal of [the Government of the Republic of Ruritania] (the Ministry of Foreign Affairs of the Republic of Ruritania) to be affixed).
>
> DONE at (Capital) this 2nd day of May 1990.
>
> SEAL SIGNED
>
> (PRESIDENT OF THE REPUBLIC OF RURITANIA)
>
> OR
>
> (MINISTER FOR FOREIGN AFFAIRS OF THE REPUBLIC OF RURITANIA)

The full powers should be on formal paper, bearing the crest of the State; but it should not contain any addresses, at the top or anywhere. The heading at the top should also indicate the nature of the document (FULL POWERS; CREDENTIALS etc.).

(Full Powers )

## FULL POWERS

I, JAMES MONOMOTAPA, President of the Republic of Ruritania, DO HEREBY INVEST His Excellency Lepidus KAIZARI, Ambassador Extraordinary and Plenipotentiary of the Republic of Ruritania to the People's Republic of Basanga, with FULL AND ALL MANNER OF POWER AND AUTHORITY for and in the name of the Republic of Ruritania, to sign the Agreement on Scientific and Cultural Cooperation between the Republic of Ruritania and the People's Republic of Basanga.

IN WITNESS WHEREOF I have signed these Presents and affixed hereto the Seal of the Government of the Republic of Ruritania.

DONE in Ruania this 4th Day of February 1990.

Seal Signed

PRESIDENT OF THE REPUBLIC OF RURITANIA

## CHAPTER VII

## ENABLING DOCUMENTS OF DIPLOMACY

### 7.0 INTRODUCTION

What we term enabling documents of diplomacy in this manual belong almost entirely to the realm of treaties. Specifically, they deal with the last formal stages of the entry into force of treaties or of the expression of consent to be bound by treaties. The three major enabling documents of diplomacy are Instruments of Ratification, Instruments of Accession and Exchange of notes.

Most multilateral treaties will require ratification before a State is considered to be bound by them; they also require a certain number of ratification before they enter into force.

Some bilateral agreements however do not always require ratification for them to enter into force, and to be binding on the States concerned. What tends to complicate bilateral treaties however, is that the treaty practices of the two States concerned may differ considerably. Thus, whereas simple signature may be sufficient to bind one of the parties, the other party may be required to fulfill certain constitutional requirements before it considers itself bound by the bilateral

treaty. Where such is the case there will usually be a clause in the treaty stating that the treaty will become binding upon exchange of letters confirming that the constitutional requirements of the two States, with regard to entry into force of treaties have been met.

It is therefore important, in dealing with the enabling documents of diplomacy, to be sure at any one time of the type of document that is required. This requires a knowledge of the constitutional treaty requirements, and a careful perusal of the requirements of the particular treaty. The first of these requirements is the job of the lawyer: the second of these is a matter for both the lawyer and the diplomat whether or not they were engaged in the negotiation of the treaty.

## 7.1.0 INSTRUMENTS OF RATIFICATION

A typical and fairly straightforward Instrument of Ratification would basically contain five paragraphs, namely, an introduction; a paragraph on the history of participation of the ratifying State in the negotiations leading to the conclusion of the treaty; a paragraph on the formal requirements of the treaty with regard to its ratification; a paragraph containing a formal statement that the ratifying State intends to and is ratifying the treaty; a testimonium (and, or, date, seal and signature).

### 7.1.2 The Introduction

The introductory paragraph of an instrument of ratification contains the full name of the treaty, and the date on which it was adopted, and the place of its adoption. Thus, taking as an example the Nairobi Treaty for the Protection of the Olympic Symbol, which was adopted in Nairobi on 26 September 1981, the Introductory paragraph would read:

> WHEREAS The Nairobi Treaty for the Protection of the Olympic Symbol [hereinafter referred to as the Treaty] was adopted at Nairobi, Kenya, on the 26th Day of September 1981;

The main requirements here are that the treaty be cited in full, and the date and place of its adoption be stated clearly. The words in brackets may or may not be included. Where they are not included, then subsequent references to the treaty must be prefaced by the words "the said Treaty". The date may be written in words or in figures - the choice is purely a matter of style. But, where words are preferred, then all consequent references to dates must also be in words.

### 7.1.3. History of Participation

The second paragraph of the Instrument of Ratification should put on record the participation of the ratifying State in the process leading to the conclusion of the treaty, e.g. details of the States participation in the Diplomatic Conference that

led to the conclusion of the treaty. It should also detail the date upon which the ratifying State signed the treaty being ratified.

> [AND] WHEREAS the Government of the Republic of Ruritania participated in the Diplomatic Conference and signed [the Treaty] (the said Treaty) on the 1st Day of October 1981;

As will be seen later this paragraph will usually be dispensed with when drafting instruments of accession since the acceding State will usually neither have participated in the deliberations leading to the conclusion of the treaty, nor signed it.

### 7.1.4. Requirements of the Treaty

The paragraph on requirements of the treaty must specify the particular provision of the treaty that requires States to ratify it. Here, care must be taken to specify accurately which provision (or sub-provision) of the treaty is operative, otherwise the instrument might be rendered void.

> AND WHEREAS Article 5(1) of [the said Treaty] (the Treaty) requires ratification by the signatory States for [the said Treaty] (the Treaty) to enter into force for the States so ratifying;

### 7.1.5 State of Ratification

The paragraph containing the actual statement that the State is actually ratifying the treaty is the central part of and the rationale for the whole instrument of ratification. This paragraph should contain three major elements. Firstly, it must state that the ratifying State has considered the entire provisions of the treaty; secondly and of the greatest importance it must contain a statement that, by that instrument the State is actually ratifying the treaty; and thirdly, it should state that the ratifying State is thereby making an undertaking to be bound by the provisions of the treaty:

> NOW THEREFORE the Government of the Republic of Ruritania, being desirous of ratifying [the said Treaty] (the Treaty)) and having further considered the provisions of the said Treaty, HEREBY RATIFIES the same, and solemnly undertakes to faithfully perform and carry out the stipulations contained therein.

### 7.1.6 Testimonium, Date, Seal and Signature

The final paragraphs containing the testimonium and the date may be either in the same paragraph or in two paragraphs. The choice is a matter of style.

[IN WITNESS WHEREOF] (IN TESTIMONY WHEREOF this Instrument of Ratification is given under my hand and the official seal of [The Government of the Republic of Ruritania] (The Ministry of Foreign Affairs of the Republic of Ruritania) [this .... day of.... 1990]

or:

(DONE at Ruania this ...Day of... 1990)

SEAL SIGNATURE

As with other formal documents of this type, the Instrument of Ratification is done on formal paper, which contains the official crest of the State ratifying, and no addresses. It should also, at the top have a heading stating that it is an Instrument of Ratification. Although in some jurisdictions the Instrument is contained on elaborate paper and in elaborate binding, this depends on the resources available, and is not a matter of any formal requirements.

20, 50, 30

(Instrument of Ratification)

# INSTRUMENT OF RATIFICATION

**WHEREAS** the Nairobi Treaty for the Protection of the Olympic Symbol was adopted at Nairobi, Kenya, on the 26th Day of September 1981,

**AND WHEREAS** the Government of the Republic of Ruritania participated in the Diplomatic Conference and signed the said Treaty on the 1st Day of October 1981,

**NOW WHEREAS** Article 5(1) of the said Treaty requires ratification by the signatory States for it to enter into force for the States so ratifying,

**NOW THEREFORE** the Government of the Republic of Ruritania, being desirous of ratifying the said treaty, and having further considered the provisions of the said Treaty, **HEREBY RATIFIES** the same, and undertakes to faithfully perform and carry out the stipulations contained therein.

**IN WITNESS WHEREOF** this Instrument of Ratification is given under My hand and the official seal of the Ministry of Foreign Affairs of the Republic of Ruritania.

**DONE** at Ruania this 2nd Day of March, 1981.

Seal

Signed

MINISTER FOR FOREIGN AFFAIRS

## 7.2 INSTRUMENT OF ACCESSION

Although the intention here is not to delve deeply into specific aspects of the law of treaties, it is necessary to highlight the main differences between the concepts of ratification and accession. Only by so doing will the layman (and some lawyers!) be able to know which of the two instruments is required when, as well as the rationale therefore.

Unlike ratification, accession does not require that a State either have participated in or signed the treaty. States accede to treaties which are already in force; and these enter into force on deposit of the necessary instruments of ratification. States may also in some cases accede to a treaty which they have not signed but which has entered into force.

### 7.2.1 The Form

In form, the instrument of accession follows closely the format of the instrument of ratification, with only minor amendments. Thus, the requirements paragraph would read:

> AND WHEREAS Article 5(ii) of [the said Treaty] (the Treaty) requires accession in order to enter force for the States so acceding;

The operative paragraph in the statement of accession, would on the other hand read:

NOW THEREFORE the Government of the Republic of Ruritania, being desirous of acceding to [the said Treaty] (the Treaty), and having further considered the provisions [of the said Treaty] (thereof) HEREBY ACCEDES TO the same and solemnly undertakes to faithfully perform and carry out the stipulations contained therein.

## INSTRUMENT OF ACCESSION

**WHEREAS** the Nairobi Treaty for the Protection of the Olympic Symbol was adopted at Nairobi, Kenya, on the 26th Day of September 1981,

**AND WHEREAS** pursuant to Article 6(ii) thereof the said Treaty entered into force on 3rd Day of July 1983,

**AND WHEREAS** Article 5(ii) of the said Treaty requires accession in order to enter into force for the States so acceding,

**NOW THEREFORE** the Government of the People's Republic of Basanga, being desirous of acceding to the said Treaty, and having further considered the provisions **HEREBY ACCEDES** to the same and solemnly undertakes to faithfully perform and carry out the stipulations contained therein.

**IN WITNESS WHEREOF** this Instrument of Accession is given under My hand and the Official seal of the Ministry of Foreign Affairs of the People's Republic of Basanga.

**DONE** at Basaia this 10th Day of January 1989.

Seal

Signed
(MINISTER FOR FOREIGN AFFAIRS)

## 7.3 EXCHANGE OF NOTES

The exchange of notes is an expeditious method of expressing consent to be bound by bilateral agreements. The agreement in question enters into force as soon as the exchange of notes is effected. The exchange of notes operates for two purposes: firstly it may operate to record the terms of an agreement; secondly it may operate to confirm that constitutional formalities have been completed.

### 7.3.1 Record of Terms of Agreement

By this method one party sends a note, detailing the proposed terms of agreements, and informs the other party that, if it is acceptable, that note and the acknowledgement thereto will constitute an agreement on the issues. Although the note bearing the proposal and the note acknowledging it should bear the same date, there is no strict requirement in law that they do so. But in practice both notes should bear the same dates since agreements should always enter into force simultaneously.

Having set out the terms of the proposed agreement - or attached them to the note - the operative paragraph of the note

would read:

> The Ministry of Foreign Affairs of the Republic of Ruritania suggests that if the terms set above are acceptable, this note and the Embassy's acknowledgement thereof constitute an agreement on the subject.

### 7.3.2 Constitutional Provisions

Sometimes, although signature of an agreement may be sufficient to bring a bilateral agreement into force for one party, the other party may be bound by certain constitutional procedures, without which the agreement cannot enter into force for it.

In such an event, the agreement would contain a provision to the effect that the agreement will enter into force upon an exchange of notes confirming that the constitutional procedures of both parties have been completed. In that case, the party requiring the fulfillment of constitutional procedures will initiate a note once those procedures are completed, stating that, the procedures being completed, the agreement will enter into force for that party on the date of the note.

But, even the party not requiring any constitutional procedures also sends a note, nevertheless 'confirming' that the

same have been fulfilled.

Such a note may read:

> The Ministry of Foreign Affairs of the Republic of Ruritania would like to inform the Embassy of the Peoples Republic of Basanga that, pursuant to Article 5 of the Trade Agreement between the two countries, the necessary constitutional requirements of the Republic of Ruritania have been completed and consequently, the Agreement enters into force for the Republic of Ruritania on (the date of this note) [23 January 1990].

The most important thing is that the two parties should have agreed on the wording of the note, and its date. The operative wording and the date must be the same. Here also the reference number of the note is important especially for the party replying to the initial note. Thus, the Embassy of the Peoples Republic of Basanga [who have no constitutional requirements] would be something along these lines:

> The Embassy of the Peoples Republic of Basanga acknowledge receipt of the Ministry's note ref.... dated January 23 1990 on the subject of the Trade Agreement between the two countries and confirm that, pursuant to Article 5 of the said Agreement the necessary constitutional requirements of the Peoples Republic of Basanga have been completed, and consequently the Agreement enters into force for the Peoples Republic of Basanga on (the date January of this note) [23 January 1990].

## CHAPTER VIII

## DOCUMENTS OF COURTESY

### 8.0 INTRODUCTION

The diplomatic documents of courtesy are complementary to some of the empowering documents, but particularly to the credentials presented by ambassadors. The two main documents of courtesy are letters of recall, and recredentials. Whereas these are formal documents, the third type of documents of courtesy are informal; this is usually a letter sent by the head of mission who has newly taken up his post, to his peers, informing them that he ~~was~~ has officially taken up his duties.

### 8.1.0. LETTER OF RECALL

It is a requirement, and is keeping with good diplomatic practice for the outgoing ambassador to present a formal letter of recall at the end of his tour of duty. The letter of recall may either be presented by the outgoing ambassador himself when he is taking his leave of the Head of the receiving State, or it may be presented by his successor, or his successor presenting his credentials.

The thrust of the letter of recall is to inform the Head of State of the country where the recalled ambassador was lately accredited that he is no longer acting in that capacity. The letter of recall is formal because the fact of the ambassador having ceased to be accredited to the receiving State will already be known.

Traditional letters of recall sometimes gave reasons why the ambassador had ceased to exercise his functions in the receiving State, as for example where he had retired from the foreign service. Modern letters of recall however are more brief and to the point and give no intimation of the reasons for recall, except that the ambassador has been re-deployed elsewhere.

### 8.1.1. The Format

Letters of recall follow closely the format of credentials especially the formal opening and the formal closing. A typical letter of recall will however contain only one substantive paragraph stating that the ambassador has been recalled. Thus where the President of Ruritania is informing the President of Basanga that he has recalled his ambassador to Basanga, he would write (after the formal opening):

> Having occasion elsewhere for the services of my trusted and well beloved John Fidel SEMAMINGI has lately been accredited to, Your Excellency's country in the [capacity] (character) of my Ambassador Extraordinary and Plenipotentiary, I cannot omit to inform you of his recall.

### 8.1.2 Statement of Satisfaction

If this seems to be rather terse, it is probably only a reflection of the times. It is however permissible to include in the letter of recall a statement of satisfaction in the way in which the ambassador being recalled has performed his duties. Thus, a second paragraph may be added in this vein:

> Having had ample reason to be satisfied with the zeal and ability with which John Fidel SEMAMINGI has executed My orders on all occasions during his Mission, I trust that Your Excellency will also have found his conduct deserving on your approbation and esteem.

The statement of satisfaction is apt especially since the receiving Head of State should send recredentials giving the allowance that he was satisfied with the conduct of the recalled ambassador.

(Letter of Recall)

James Monomotapa
President of the Republic of Ruritania

To His Excellency
Joshua Mwana Wa Mberi
President of the People's Republic of Basanga

SENDETH GREETINGS!

Dear and Good Brother,

Having occasion elsewhere for the services of My trusted and well beloved John Fidel SEMAMINGI who has lately been accredited to YOur Excelleny's country in the character of My Ambassador Extraordinary and Plenipotentiary, I cannot omit to inform You of his recall.

Having had ample reason to be satisfied with the zeal and ability with which John Fidel SEMAMINGI has executed My orders on all occasions during his mission, I trust that Your Excellency will also have found his conduct deserving of Your approbation and esteem.

I commend Your Excellency to the protection of the Almighty.

Your Brother,

Date Signed

PRESIDENT OF THE REPUBLIC OF RURITANIA

## 8.1.3 RECREDENTIALS

On receiving the letter of recall, the Head of State of the receiving country will as a matter of courtesy cause recredentials to be sent. These express his satisfaction at the conduct of the recalled ambassador, during his tenure in the receiving State. Thus, the President of Basanga would send the following recredentials to the President of Ruritania:

> I have received from the hands of Esau EBIMELECH the letter which Your Excellency addressed to Me [on 20.1.1990], and in which Your Excellency acquainted the Me of the termination of the Mission of John Fidel SEMAMINGI as Ambassador Extraordinary and Plenipotentiary on my Country.

## 8.1.4. Statement of Assurance

This first paragraph is mainly - indeed entirely - an acknowledgement of the letter of recall. The recredential may end there but could go further and include a paragraph expressing the hope that the ambassadors conduct was found satisfactory. A second paragraph may thus be added:

> I think it due to John Fidel SEMAMINGI to assure you that his language and conduct during his [mission] (residence in My Country) have been such as to merit My approbation and esteem, and have been uniformly and zealously directed to the maintenance and improvement of the relations of friendship which exist between the People's Republic of Basanga and the Republic of Ruritania.

### 8.1.5 The Format

The format of the recredential after the statement of assurance follows the same form as in letters of recall or credentials.

(Recredentials)

Joshua Mwana wa Mberi
President of the People's Republic of Basanga

To His Excellency
James Monomotapa
President of the Republic of Ruritania

SENDETH GREETINGS!

Dear and Good Brother,

I have received from the hands of Esau EBIMELECH the letter which Your Excellency addressed to me on 15.10.1989, and in which Your Excellency acquainted me of the termination of the Mission of John Fidel SEMAMINGI as Your Ambassador Extraordinary and Plenipontiary in My Country.

I think it due to John Fidel SEMAMINGI to assure Your Excellency that his language and conduct during his mission here have been uniformly and zealously directed to the maintenance and improvement of the relations of friendship which exist between the People's Republic of Basanga and the Republic of Ruritania.

May God have Your Excellency in His wise keeping.

Your Brother,

Date Signed

PRESIDENT OF THE PEOPLES REPUBLIC OF BASANGA

# CHAPTER IX

# DOCUMENTS OF NEGOTIATION

## 9.0 INTRODUCTION

Documents of negotiation are not, strictly speaking, documents of diplomacy in the same way as those documents we have already considered. In fact, they might more properly be termed 'conference documents'. They have however been included here as documents of diplomacy because the diplomat should have a certain competence in their drafting, in order to be efficient.

In multilateral diplomacy, documents of negotiations are prepared by a secretariat employed to do the background preparations and to give guidance during conferences. However, since a lot of international conferences are held outside established multilateral frameworks, officials in the foreign office may be called upon to provide secretariat facilities; it is therefore necessary for them to be familiar with the main documents of negotiations.

The three broad categories of documents of negotiations are background papers, summary records and reports.

## 9.1.0 BACKGROUND PAPERS

Background papers consist of all the information and documentation that will be required by the participants during a conference (or other meeting). Where the meeting is a follow up session, the information required includes the reports of the previous meetings, and any documentation that is required since then. Where further study was agreed upon, then these studies will also form part of the documentation.

There is no particular format for background papers. The most important technical requirement for them however, is that they contain serial or reference numbers in order to facilitate their easy access and reference.

## 9.1.1. SUMMARY RECORDS

Once the conference has began, records must be kept of all interventions and all statements made during the sessions. There are two main types of records: summary records and the Report.

Summary records are records *in extenso* of statements made by individual participants during the negotiations. These are virtually verbatim records and reflect all the relevant statements made. These are usually not circulated except on request. They are retained by the secretariat for their records.



Delhi Monitors

They are useful as travaux preparatoires, and can in the future be used to tell precisely what participants intended to do or to achieve.

9.1.2 The Format

Summary records should state the name (most appropriately the surname) of the speaker, and the country or organization that the he represents. They should ideally then paraphrase the intervention of that speaker. Although it is not a hard and fast rule, the names should not be prefixed by titles such as "Dr.", "Prof.", etc. It is sufficient that for men the prefix "Mr." be used, and for ladies "Mrs." or "Miss", where the intervention was made from the chair the proper way to state it would be "The Chairman" etc. Thus the summary record of intervention would read:

> 1. Mr. ABC (Ruritania) said that, in view of the lack of data on the effectiveness of the structural adjustment programmes in Africa, African countries should be wary of adopting them wholesale. Until such data had been collected, these countries should consider adopting a joint approach in their dealings with the World Bank and the International Monetary Fund.

The idea behind summary records is to reflect the views of every delegate or participant who takes the floor. Summary records will therefore invariably reflect the diversity of all views

rather than compromises reached. Here, they reflect the process by which the compromise was arrived at rather then the compromise itself.

Where the intervention by a delegate is lengthy, the contribution should be included in two or more paragraphs. This facilitates order, and avoids repetition. Thus, a second paragraph in the example given would read:

> 2. Furthermore, since not all the countries represented have accepted the conditionalities of the IMF structural adjustment programmes, the collection of such data has been hampered by practical problems.

Care should be taken to ensure that the progression of the paragraphs flows: undue repetition of introductory words should be avoided, by using different formulae. For instance in the above example, if the intervention was to continue, subsequent paragraphs may begin with words other than "furthermore", e.g. "He said" "while agreeing" These will however depend on the thrust of the intervention.

### 9.1.3 Organization of Summary Records

Summary records should state what meeting it is; they should also indicate the particular session the day, date and time when

the meeting was scheduled and when it was called to order; they must also indicate who was chairman at that particular session and the country he represents. The summary records should also carry a reference number; and where certain documents will be referred to during the session, the reference numbers of these documents should be stated. Thus the following information should appear before any substantive summary is given:

281st [Meeting] (Session)
Monday, 15 January 1990 at 9 a.m.
Chairman: Mr. XYZ (Basanga)

Doc. Reference: [re reference number of this document].

The [Meeting] (Session) was called to order at 9.15 a.m.

ORGANISATON OF AFRICAN UNITY :ECONOMIC COMMITTEE

MEETING OF EXPERTS ON THE AFRICAN ECONOMY

[Documents: i.e. documents referred to during the session]

After this, the summary records proper commence, in the manner already pointed out. At the end of the session, it is required that the time the meeting adjourns is also recorded. Thus:

The Meeting rose at 12.35 p.m.

Where, during the course of a particular session the meetings is

adjourned/suspended for a short while to facilitate consultations, and then resumes, this should also be noted immediately after the record of the speaker immediately preceding the adjournment:

> The [Meeting] (Session) was [adjourned] (suspended) at 10.15 and resumed at 10.45 a.m.

After this note, the records continue, without interruption. Whether a new speaker has taken the floor or the previous speaker continues, his name should appear at the beginning of the records of the resumed session.

It often happens, that during the course of the negotiations the chairman might put a proposal forward to the delegates for decision. In such an event, after recording what the proposal was, the decision to be adopted should be stated in the paragraph following. Thus, where the chairman suggests that a drafting group be formed to draft a particular consensus, the records would read:

> 20. The CHAIRMAN recalled that it had been proposed that a drafting group be st up to consider the views put forward at the last session. He took it, if there were no objections, that the drafting group be composed of X,Y,Z.
>
> 21. It was so decided.

9.2.0. <u>THE REPORT: MULTILATERAL</u>

In many ways, the report is the most important document of negotiations. It details the trend of discussions in summary form, and outlines the areas of agreement, the areas where no agreement was reached, and the areas where issues were deferred for another meeting, for further consideration.

As the report is the document that the participants take back with them, and the basis on which they formulate their reports, the report of the negotiations should be accurate, and brief, but at the same time without overlooking substantive issues.

Although ideally the Report should record the agreed views of the meeting, this is not always possible since many delegates - and especially delegates who expressed minority or unpopular views insist that their views be recorded: the secretariat has therefore, within the limitation it is working under endeavour to report those views in an acceptable manner.

9.2.1 The Format

Final Reports of negotiations consist of the details of the meetings [the sessions, dates, place of meeting and reference number] After these formal details there is an introduction, which in a few paragraphs gives a brief history of the meeting,

the member States represented, the observers represented, and a record or brief history of background papers discussed. It should also contain a list of the officers elected (i.e. the chairman, vice chairman and rapporteur, and the countries they come from); it will also list the documents and their reference numbers which were considered at the meeting and it will also state the agenda which was agreed upon and adopted.

Because the Report must be adopted before it is considered to be final, all reports written before adoption must be referred to as "Draft" Reports. It is only after adoption - with the necessary amendments that the designation 'Draft Report' is dispensed with: The layout would look something like:

DOC. REF.

(a) ORGANISATION OF AFRICAN UNITY
(b) MEETING OF EXPERTS ON THE AFRICAN ECONOMY
(c) 20th - 30th SESSION
(d) Addis Ababa April 2-10 1990

DRAFT REPORT ON THE MEETING OF EXPERTS ON THE AFRICAN ECONOMY

INTRODUCTION

The paragraphs comprising the introduction would contain the following information, and in the following order:

1. History of the sessions and member states present
2. Studies prepared by the Secretariat and discussed, and the decisions taken on them.
3. Member states present.
4. Observers present.
5. Officials elected, and their countries.
6. Documents before the conference.
7. The agenda adopted. [This paragraph would include the following: election of officers, adoption of the agenda; consideration of the substantive matters before the conference; other business; adoption of the report].

The rest of the Report includes headings based on the substantive items that were discussed during the conference. Here, because the Report only deals with final views agreed upon, compromise solutions etc, no names appear. Each paragraph under each item will briefly state the points of agreement. In order to reflect this state of affairs the paragraphs will begin in a way that will make this clear to the reader. Thus the following formulas are usually adopted in writing reports of this nature:

"The view was expressed that...."
"There was wide agreement....."
"It was noted....."
"It was suggested that....."
"It was observed....."

But these are not by any means exhaustive. Because the writing of reports is a work of art, this type of formula could be as

diverse as there as report writers.

Unlike in the summary records where interventions must be recorded in the order that they were made, the final Report must marshall all similar views and report them together, in one or more paragraphs, as the case may be. Writing a good report therefore requires the ability to read masses of statements and to summarize them without sacrificing substance to brevity.

## 9.3.0 THE REPORT: BILATERAL

By and large, reports emanating from bilateral negotiations will be much briefer than those from multilateral negotiations. Reports of bilateral negotiations will also reflect points that were agreed upon. They are therefore much more amenable to summary and brevity.

Mostly because of their less complex nature, bilateral reports are usually referred to as "Agreed Minutes". Unlike reports of multilateral negotiations these are approved and signed by the respective leaders of delegations.

Agreed minutes will contain the heading, some information as to what delegations were meeting about; the matters discussed (i.e. the agenda) the agreement reached; a statement about the atmosphere in which the negotiations were held and the date, and

signatures.

9.3.1 The Heading

The heading of agreed minutes will detail the subject matter of the negotiations and the parties (the States) represented and the dates. Thus if Ruritania and Basanga met to discuss a bilateral air services agreement, the heading would read:

> NEGOTIATIONS ON BILATERAL AIR SERVICES BETWEEN THE GOVERNMENT OF THE REPUBLIC OF RURITANIA AND THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BASANGA HELD AT (CAPITAL) FROM 15 - 17 JANUARY 1990.
>
> AGREED MINUTES

Since the minutes will be done in duplicate, it is customary to have one copy beginning with the name of one country and one copy with the other country on the other copy.

> 1. Delegations representing the Government of the Republic of Ruritania and the Government of the Peoples Republic of Basanga met in Ruania on 3-6 April 1990 to discuss bilateral air services between and beyond their respective borders.

9.3.2 The Agenda

The second paragraph will detail out the full agenda that was discussed:

> 2. The Delegations discussed the following agenda: route schedule third and fourth freedom traffic rights, fifth freedom traffic rights; cargo;

repatriation of funds; equipment.

### 9.3.3. Points of Agreement

This is the most important paragraph in the agreed minutes. It must clearly spell out what it is that two sides agreed upon.

> 3. IT WAS AGREED that the designated airline of the Republic of Ruritania would operate flights with third and fourth freedom traffic rights on the following sectors:
>
> 4. IT WAS AGREED that.....

### 9.3.4 The Atmosphere

It is customary - and good diplomatic practice to include a paragraph stating that the negotiations were held in a cordial and friendly atmosphere. This is the case even where, in the opinion of the delegates the atmosphere was rather charged. This particular paragraph reiterates the fact that the good relations between the two countries will continue to exist in spite of disagreements in these particular negotiations:

> 5. The negotiations were held in a friendly and cordial atmosphere, characteristic of the good relations between [the two countries] (the Republic of Ruritania and the People's Republic of Basanga).

### 9.3.5 List of Delegations

The list of delegations should be annexed to the Agreed Minutes. This avoids the text of minutes being clattered by too much information. On the text itself, a statement would appear stating that the list of delegations is annexed:

6. [A] (The)List of Delegates is annexed hereto.

Although practice may differ from country to country, it is customary in the list of delegations to list delegates in order of seniority. Also delegates from government ministries or departments must always precede delegates from e.g. parastatals and private industry, in the list of delegations. The list of delegations should also state the official designation of each delegate:

| | | |
|---|---|---|
| 1. | Mr. XYZ [LEADER OF DELEGATION] | Permanent Secretary, Ministry of Transport and Communication. |
| 2. | Mr. DFC | First Secretary, Embassy of Ruritania in Basanga. |
| 3. | Mr. HFK | State Counsel, Attorney |

Generals Chambers,
Ruritania.

4. Mr. KLM — Area Manager, Ruritania Airways, Basanga.

9.3.6 Date and Signatures

There is no elaborate formula as to how the date and signatures appear. It is only important to remember that the country whose name appears first in the heading will appear on the left for the purposes of signature. And, since in one copy one country appears first, and appears second on the other copy of the agreed minutes, this should be reflected at the end of the minutes.

DONE AT RUANIA this 15th Day of January 1990.

| | |
|---|---|
| ..... | ..... |
| (XYZ)<br>(FOR THE [DELEGATION OF THE]<br>GOVERNMENT OF THE REPUBLIC OF RURITANIA | (ABC)<br>FOR THE [DELEGATION OF THE]<br>GOVERNMENT OF THE PEOPLE'S REPUBLIC OF BASANGA |

9.4.0 PRESS RELEASES

Press releases are not mandatory, but they are sometimes released following the conclusion of negotiations, and especially those negotiations which have attracted a lot of public interest. But, unlike agreed minutes or other types of reports, press releases are public documents: as such, they do not carry as much information, and definitely do not carry information whose circulation may be limited. Care must therefore be taken, while giving the essence of agreements reached, not to divulge information which is not meant to be public.

Press releases will therefore be marked more by their generality than by the amount of detail they carry. For this reason, press releases should be brief documents. There is no formal way of drafting these, and the final product will depend more on the style of the drafter than on any adherence to a particular format. Therefore, apart from mentioning the subject of negotiations, the press release will only briefly mention the points of agreements, without going into too much detail about them.

## 9.5.0 COMMUNIQUES

Communiques are issued when heads of state or Government or their representatives have met. When only two of them meet

they may issue a joint communique. It is probably not very inaccurate to state that communique's are the Reports issuing from a meeting of Heads of State or Heads of Government. The most regular communiques are those after the commonwealth heads of Government meetings.

### 9.5.1 The Format

Communiques share elements of Reports from multilateral meetings, from Agreed Minutes of bilateral meetings, and from press releases.

The distinctive feature of communiques lies in their opening paragraphs and in their ending. The heading details the meeting in question, the date and the place of where the meetings took place: thus, for a meeting of commonwealth heads of Government meeting the heading would read:

> [COMMONWEALTH HEADS OF GOVERNMENT MEETING, 1977 (LONDON, 8-15 JUNE]
>
> FINAL COMMUNIQUE

### 9.5.2 The Introductory Paragraphs

The introductory paragraphs detail the dates of the meeting,

the States represented, the level of representation, and the state which chaired the meeting:

> 1. Commonwealth Heads of Government met in London from 8-15 January 1977. A,B,C,D, were represented by their Presidents. E,F,G,H, were represented by their Prime Ministers. J,K,L were represented by their Ministers of Foreign Affairs; M was represented by the Minister of Finance. The [Prime Minster] (President) of N was in the chair.

Other introductory paragraphs mention matters such as new members, and the atmosphere of the meeting. There may also be a paragraph reviewing in a general way the matters that were discussed without going into any details about them.

9.5.3 Substantive Paragraphs

The items discussed are each reported in a separate paragraph bearing the name of the agenda item discussed. Because communiques usually aim at agreements, it is the substance of the matters agreed upon that appear in the substantive paragraphs. Where a particular State does not join the consensus, but insists that its views nevertheless be recorded, this is done in the paragraph following the statement of the general consensus. In such a case it is acceptable to state the country whose views were in dissent:

> 3. THE QUESTION OF SOUTH AFRICA
>
> (1) The views of Ruritania are set out in

paragraph 4.1

(2) Heads of Government discussed the problem of South Africa and agreed that the adoption of further substantial economic measures against South Africa is moral and political imperative to which a positive response can no longer be deferred.

### 9.5.4 Date and Delegations

At the end of the substantive paragraphs are formal paragraphs which express gratitude to the secretariat, approve the previous report and note the venue of the next meetings. This is followed by the date on which the communique is issued, plus a list of heads of delegation in alphabetical order.

### 9.5.5 Joint Communique

A joint communique will basically follow the same format. It will identify the Heads of State who met, detail out the essence of the discussions that took place, and the date and names of the Heads of State.

# CHAPTER X

# AGREEMENTS

## 10.0 INTRODUCTION

A lot of the daily business of modern diplomacy is concerned with the negotiation, drafting, interpretation and implementation of agreement. In the multilateral forum, the drafting of treaties - though not always their negotiation - is left to lawyers. But in the bilateral forum the generalist diplomat will encounter many occasions when he may be required to negotiate agreements, or peruse them before forwarding them to the legal experts. The diplomat in the bilateral forum is therefore well served by having a working knowledge of the techniques of drafting bilateral agreements. And, even though he may not be expected to have specialized knowledge of the intricate business of drafting treaties and agreements, he should have a functional knowledge of the standard clauses that form part of any agreement. Particularly an acquaintance with the types of preliminary and final clauses of agreements is useful.

This chapter will deal primarily with the drafting of preliminary and final clauses of bilateral agreements: but it should be noted that much of what will be said about bilateral

agreements will apply equally to multilateral agreements, since the spirit of drafting for both is the same.

## 10.1.0 THE ANATOMY OF BILATERAL AGREEMENTS

Bilateral agreements have basically three main parts: the preliminary clauses; the substantive clauses, and the final clauses.

## 10.2.0 PRELIMINARY CLAUSES

Preliminary clauses in bilateral agreements [and also in multilateral agreements] consist of the title, the preamble, and definitions. Although these are formal clauses, they are important because at a glance they identify the parties to the agreement, the subject of the agreement and the purpose of the agreement.

### 10.2.1 The Title

The title is the first thing that appears on the top page of the agreement. It identifies the parties to the agreement, as well as the subject of the agreement. Therefore, supposing that Ruritania has negotiated a bilateral agreement with the Pan Utopian Development Authority regarding the establishment of its

headquarters in Ruritania. The title would read:

> AGREEMENT BETWEEN THE GOVERNMENT OF THE REPUBLIC OF RURITANIA AND THE PAN UTOPIAN DEVELOPMENT AUTHORITY REGARDING THE ESTABLISHMENT OF THE HEADQUARTERS OF THE PAN UTOPIAN DEVELOPMENT AUTHORITY IN RURITANIA.

### 10.2.2 THE PREAMBLE

The preamble expresses the hope, and the intentions of the parties in seeking to conclude an agreement. It is not necessary for the preamble to be elaborate; it should rather be succinct, and to the point. The preamble is usually preceded by the names of the parties to the agreement:

> The Government of the Republic of Ruritania and the Pan Utopian Development Authority,
>
> Desiring to conclude an agreement to regulate the establishment of the Headquarters of the Pan Utopian Development Authority in Ruritania;

Nevertheless the preamble should mention any facts which are relevant to the conclusion of the agreement, as for instance the existence of other agreements which mandate them to conclude an agreement. Thus, in the present example, if the Pan Utopian Authority has an Establishment Agreement, to which Ruritania was a party, and which required member States to accord certain recognition to the Authority, the preamble might continue:

Recalling [the provisions of] (Article X) of the Agreement Establishing the Participation Development Authority;

The final words of the preamble must then assert that the parties have agreed on the provisions that will follow. The last words of the preamble therefore always read:

HAVE AGREED AS FOLLOWS:

10.2.3 Definitions

Agreements must always contain a definition clause or article. Whatever the subject matter of the agreement is, there are always terms about whose meanings both parties must be clear at the outset. These include the short form by which the parties to the agreement will be referred to in the substantive part of the agreement; technical terms which arise in the agreement, and whose meanings may not be universally known, etc. It is better to have many definitions, than to leave expressions undefined, thereby creating problems of interpretation later.

The most important function of the article on definitions (which is always the first article in agreements) is that it facilitates interpretation of the agreement. This is important both for purposes of the implementation of the agreement (parties

must know what they are undertaking to implement, and with regard to what), but also in the case of a dispute arising: it is easier to settle a dispute and especially a dispute on interpretation where there is a proper definition article.

The introduction to the definitions article must state that the definitions given are definitions relating to that particular agreement:

ARTICLE 1

DEFINITIONS

In this Agreement [unless the context otherwise requires]:

The expression in brackets does not necessarily have to be included, since, in interpreting agreements it is understood that the parties cannot have intended to achieve absurd results. But the good draftsman will want to leave nothing to chance: It is therefore a preferred approach to introducing the definitions.

The short form that will be used by the parties to the agreement should always be defined first; in our example in the agreement between Republic of Ruritania and the Pan Utopian Department Authority:

(a) [the term] (the expression) "the Government" means the Government of the Republic of Ruritania;

(b) [the term] (the expression) "the Authority" means the Pan Utopian Development Authority;

In this type of agreement other phrases which should always be defined are terms such as 'headquarters' 'officials' 'appropriate authorities' and also what is meant by the laws of the host country ie. 'Law of Ruritania'. But, the terms to be defined will depend largely on the subject of the agreement. As such, there can be no hard and fast rule as to what must be defined. And, because of the diversity of areas covered by bilateral agreements, it is not possible to catalogue terms to be defined in every agreement.

## 10.3.0 THE SUBSTANTIVE PART

The substantive part - or the body of the agreement begins after the definitions article, and consists of the articles between the definitions and the first of the final clauses. The substantive articles of the agreement detail out the substance of what the parties have agreed. The articles comprising the substantive part may be as few or as many as are required. This all depends on the nature of the agreement, and the extent of the matters that the parties are agreeing upon.

In drafting this part of the agreement, care should be taken to ensure that no terms appear in it which are not generally understood by the parties, unless those terms or expressions have been defined in the article on definitions. Care should also be taken to ensure that what is drafted in this part reflects what the parties have actually agreed. This is especially important when the agreement is being done in two languages, and particularly when the agreement provides that the texts of both languages are equally authentic.

## 10.4.0 FINAL CLAUSES

The final clauses of agreements are one of the most important - if not the most important parts of the agreement. They deal with such matters as the entry into force of the agreement; the termination of the agreement; the duration of the agreement, arbitration, amendments and authenticity of the text. For these reasons, these clauses call for very careful drafting, and also require a sound knowledge of the treaty practice of the parties to the agreement. We shall discuss the drafting of each of the final clauses in turn: and the suggested order of their occurrence in agreements will be given at the end of this section.

### 10.4.1 Entry Into Force Clauses

No agreement can be valid until it has entered into force. It is therefore necessary for every agreement to state, specifically the time at which it will enter into force. State practice differs widely on the entry into force of agreements. While for some States signature is sufficient for the agreement to enter into force, for other States there must be ratification before the agreement enters into force. For yet other States, even without the requirements that there must be a formal instrument of ratification there are certain constitutional procedures required for the proper expression of consent to be bound. These matters should be borne in mind in drafting entry into force clauses, so that where State practices differ, these differences are reflected.

Bilateral Agreements must enter into force on the same day for both parties. It is a wrong drafting principle to have an entry into force clause which appears to suggest that the agreement will enter into force on different dates for each of the two parties. This position is unlike that obtaining for multilateral treaties where States become definitely bound when they have deposited their instruments of ratification.

### 10.4.2 Entry Into Force by Signature

Drafting an entry into force clause where signature sufficient to bring the agreement into force for both parti presents no problems. In such a situation a simple a straightforward clause is sufficient:

> This Agreement shall enter into force [up signature by both parties] (on the date on whi it is signed on behalf of the Republic Ruritania and the Peoples Republic of Basanga).

### 10.4.3 Constitutional Provisions and Signature

Where one party to the agreement requires that certa internal constitutional procedures be complied with before enters into force for it, but where the other party is satisfi with the signature alone, these facts must be reflected in t entry into force clause. Even then the dates of entry into for must correspond.

To take care of this type of situation, the device exchange of letters is used. By this device, both partie exchange letters at a later date, stating that their respectiv constitutional procedures have been complied with, and that t agreement enters into force on the date of exchange of such letters. The entry into force clause must reflect this reality:

> This Agreement will enter into force on the date that [both parties] (the Government of the Republic of Ruritania and the Government of the Peoples Republic of Basanga) exchange letters confirming that their respective constitutional procedures have been complied with.

### 10.4.4 Provisional Application

Sometimes, because the necessary constitutional procedures may take quite a long time, the parties may agree to apply the terms of the agreement provisionally pending the definitive entry into force of the agreement on completion of the constitutional procedures, or pending the exchange of letters. Until that time the signature applies only ad referendum, and the following drafting approach can be used to show this:

> The provisions of this Agreement will apply provisionally [upon signature] and will enter into force [definitively] on the date that [both parties] ( the Government of the Republic of Ruritania and the Government of the Peoples Republic of Basanga) exchange letters confirming that their respective constitutional procedures have been complied with.

A common error in drafting this latter version of the entry into force clause is to refer to the provisions of the agreement entering provisionally into force. This is fallacious and must be avoided. An agreement either enters into force or it does not. It can not partly enter into force. Therefore the proper

reference is to the provisions of the agreement applying provisionally.

### 10.5.0 Termination Clauses

Either party to an agreement may, during its currency, wish to opt out of it. This decision may be occasioned by disputes which have not been able to be solved, or it may be occasioned by any of many reasons. But for whatever reasons a party exercises its right to choose to cease being bound by the agreement, the terms of the agreement must contain a termination clause enabling a party to terminate it.

The termination clause should have two main components. Firstly it should state that the agreement will be terminated by either of the parties giving notice of termination. Secondly it should state the period after which such termination will take effect, since agreements should not generally terminate immediately on receipt of notice but sometime after such receipt.

### 10.5.1 Statement of Termination

The statement of termination should be the first sentence of the termination clause. That sentence should be short, concise and clear, so as to leave no room for say doubts as to its intention:

10(a) This Agreement may be terminated by either party giving notice of termination.

The statement may take other forms, provided that its essence remains clear and succinct. Thus, it may be more prosaic:

> Either Party may [at any time give notice] (give notice at any time) to the other party of its decision to terminate this Agreement.

### 10.5.2 Termination Period

The statement of termination is followed by another sentence stating the time at which the termination will take effect. The period of termination of the agreement will depend on the agreement of the parties.

> In such [case] (event) this Agreement will terminate twelve (12) months after the date when the notice is received by the other party.

Often both these sentences can be merged into one single sentence, providing that the main ingredients have been included:

> This Agreement will terminate twelve (12) months after either party has received from the other party a notice of its decision to terminate the Agreement.

### 10.5.3 Incomplete Projects

If both parties agree, there may be inserted a provision

that those projects which will not have been completed at the time the agreement is terminated, will be allowed to continue until completion. This is by no means a standard clause. Its efficacy will depend on the reasons for termination of the agreement, and also on the goodwill existing between the parties. If the parties wish to insert this type of clause, then it will be inserted as a sub-article of the main clause:

> 10(b) [Notwithstanding] (without prejudice to) the provisions of Article 10(a) of this Agreement, both parties undertake to facilitate the completion of projects already in progress at the time of termination.

10.6.0 Amendments Clause

All agreements should carry an amendment clause. The process through which amendments are to be effected is a matter for agreement between the two parties. But the process should not be made cumbersome, and a straightforward formula pays off better in the end.

A general amendment clause should have two components: how the parties will approach the process of amendment, and a statement as to how the amendments will enter into force.

If the parties to the agreement are negotiating a subject covered by a multilateral treaty, and if both parties are bound

by that multilateral treaty, then there should be a clause stating that any amendments to the agreement must conform to the provisions of that multilateral treaty. A good example of this is where the parties are negotiating a bilateral air services agreement. There both parties will almost invariably be parties to the convention on International Civil Aviation (Chicago, 1944). For this reason, they will be bound by that convention, and they should not agree on provisions which go against the spirit and letter of that convention.

### 10.6.1 Mutual Agreement

The first part of the amendments clause should state that the agreement may be amended by mutual agreement between the parties - since, obviously, there can be no unilateral amendments:

> 11(a) This agreement may be amended by mutual agreement between both parties.

### 10.6.2 Entry Into Force of Amendments

Although it is not a mandatory rule, amendments should enter into force upon exchange of notes. This is the most straightforward method for amendments to enter into force: and it will apply whether the parties agreed to the amendments through actual negotiations or through correspondence. The second part

of the amendments clause would therefore state:

> 11(b) Amendments to this Agreement will enter into force on the date they are confirmed by exchange of notes.

### 10.6.3 Conforming with Multilateral Treaties

The third part of the amendments clause is optional, and depends on the subject of the agreement and on whether both parties are bound by a multilateral treaty dealing with the subject of the agreement. Thus, for instance where the parties are negotiating a bilateral air services agreement, and are both parties to the Chicago Convention of 1944, they would provide that:

> 11(d) This Agreement and any subsequent amendments thereto shall be amended so as to conform to any multilateral [Treaty] (Agreement) which may become binding on both contracting parties.

It is important to bear in mind the fact that for this type of clause to be effective and necessary, both parties to the agreement must be parties to the multilateral treaty in question, since if such a treaty is not binding on one of the parties, then that party will not be required to abide by its provisions.

### 10.7.0 Duration and Review Clause

Not all agreements are expected to last either until one o the parties invokes the termination clause. In principle also agreements of most types should not last in perpetuity Therefore there should be provision for a review clause, an depending on the type and nature of the agreement, a duratio clause. A duration clause is most relevant in those agreement dealing with projects whose time of completion can be accurately estimated, or is known. Also where for instance funds are to be given over a period or time and in stages, then a duration clause may be pertinent. A review clause, on the other hand will provide that even after the period of duration ends, both parties may review the agreement and either let it terminate or renew it.

### 10.7.1 The Duration

The period of the duration of the agreement is a matter for both parties to agree on. The period will also depend on the subject of agreement. It is not a good practice to have an agreement whose duration is too long. It is better to have a shorter period of duration with provision for review rather than to have a very long duration period.

In drafting a duration clause special care must be taken not to override the parties right to invoke the termination clause at any time, since that right is one which cannot be contracted away. Thus may be stated positively:

> 11 Subject to the provisions of Article 10(a), this agreement shall be in force for [a period of] (five) years, unless renewed by mutual agreement.

This clause may also be stated negatively by stating that the agreement will terminate automatically after the agreed number of years, unless the parties agree to review it:

> 11 Subject to the provisions of Article 10(a) this Agreement shall automatically [terminate] (cease to be in force) five years after it enters into force, unless both parties renew it by mutual agreement.

## 7.8 Arbitration Clauses

Arbitration (or settlement of disputes) clauses foresee the possibility that there may arise a dispute between the parties and tries to formulate a procedure by which such disputes may be resolved.

### 10.8.1 The Choice of Arbitration Clause

The choice of the type of arbitration clause depends on the

nature of the agreement. The arbitration clause may be simple, or it may be complex. Also, it may require that the parties to the agreement appoint the arbitrators themselves, or it may be preferred to have institutionalized arbitration, for instance that conducted under the auspices of the Multilateral Investment Guarantee Agency (MIGA), the International Centre for the Settlement of Investment Disputes (ICSID) etc.

But it should always be borne in mind that the essence of arbitration is to have a process which is speedy, inexpensive, and friendly. The parties wish to avoid taking their dispute to court, and the arbitration clause should facilitate this.

### 10.8.2 Anatomy of the Arbitration Clauses

In general arbitration clauses [that is those arbitration clauses not referring to institutional arbitration] five main elements must be present: there should be a clause stating that in the case of a dispute both parties will first of all try and settle the dispute through consultations; there should also be a clause stating that in the event that the parties are unable to solve the dispute by consultations, the parties may each appoint one arbitrator; the third clause deals with the appointment of the chairman of the tribunal; there must be a clause limiting the time that the arbitration will take; and there should be a clause

stating that the decision of the arbitrators will be final, and binding on both parties.

### 10.8.3 Settlement through Consultations

This clause must state that the parties to the agreement will initially attempt to settle any dispute through consultations. It should be brief:

[ARBITRATION] (SETTLEMENT OF DISPUTES)

12(1) [If any dispute arises] (In the event of any dispute arising) between the contracting parties on the interpretation or application of this Agreement, both contracting parties shall initially endeavour to [settle] (resolve) it [through] (by) [consultation] (negotiation).

### 10.8.4 Appointment of Arbitrators

The second part of the arbitration clause foresees the probability that the parties may be unable to resolve their dispute through consultations or negotiations. It provides for the process the parties should adopt in such an event, namely to appoint arbitrators. The usual practice is for each of the parties to nominate one arbitrator, and for the arbitrators so

appointed to appoint a third arbitrator who shall act as the chairman:

12(2) If the contracting parties fail to reach a settlement by [consultations] (negotiations) they shall submit the dispute to a tribunal of the three arbitrators. Each contracting party shall appoint one arbitrator and the third who will act as the chairman, will be appointed by the two so nominated.

Failure to Agree on Chairman

It may sometimes happen that the two arbitrators appointed by each party are unable to agree on a third arbitrator who shall act as the chairman. The arbitration clause should provide for this contingency. This is customarily done by using the good offices of a third party, whom the parties agree upon, and whose job it will be to appoint the chairman. This third party may be the head of an organization such as the United Nations or its special specialized agencies, the regional organizations such as the OAU etc. In any case the person should be the head of an organization to which both parties to the agreement belong. It is good practice to provide that the arbitrators so appointed shall be a national of a third State:

12(3) If the two arbitrators fail to nominate the chairman within....(months) the Secretary General of the Organizations of African Unity may be requested [ba

either contracting party] (by agreement between the parties) to appoint the chairman, who shall be a national of a third State.

The choice of the third party to appoint the chairman of the tribunal should be guided by the subject matter of the agreement. Thus for instance, where the agreement is on bilateral air services, such a person may be the president of the International Civil Aviation Organization (ICAO) etc. In any event, where such a person is named, such person should be given early notice, by sending him a certified copy of the agreement once it is signed.

10.8.5 Time Limits

An arbitration procedure which takes unduly long to complete defeats the whole purpose of arbitration as a system of the settlement of disputes. The parties to the Agreement must therefore provide for time limits within which each shall appoint or nominate an arbitrator; the time limit within which the two arbitrators shall appoint their chairman; the time limit within which the third party shall appoint the chairman in default, and

useful, but not mandatory, the time limit within which the tribunal shall arrive at its findings. A time limitation clause may therefore read:

12(4) Each of the contracting parties shall

[nominate] (appoint) an arbitrator within [sixty days (two months) from the date of receipt from the other party of a notice requesting the arbitration of the dispute by such a tribunal. The two arbitrators so appointed shall appoint the third arbitrator within a further period of [sixty days] (two months)

It should be noted that the time limit for the third party to appoint the chairman may be included in this clause, or in the earlier clause (12(3)). In either event the agreed limit should be communicated to him at the time that the request for him to appoint the third arbitrator is made.

It should be remembered in drafting the time limit part of the arbitration clause that the period contemplated should be long enough to allow communication to be made, but not too long as to keep the dispute pending indefinitely. The reason for this is that all the time while a search for a solution to the dispute is ongoing, the agreement may have frozen, with its provisions not being implemented by either party.

### 10.8.6 Procedure and Costs of Tribunal

The question of the procedure to be adopted by the tribunal can be troublesome, but it need not be so. In order to avoid the complications of the rules of private international law on

matters such as choice of rules of procedure, forum of arbitration taking of evidence and so on, it is advisable to provide in the arbitration clause that the arbitrators shall determine their own rules of procedure. By the same token, it should be provided that the arbitrators shall determine their own costs and the apportionment thereof. This avoids the possibility of the parties to the agreement getting involved in further disputes.

12(5) The [Arbitrators] (arbitral tribunal) shall determine its own procedure and decide on the apportionment of the cost of the arbitrators.

10.8.7 Decision of the Arbitrators

The parties, in choosing to use arbitration rather than resort to a suit in court, expect that the arbitrators decision will be fair: indeed, the reason why each party appoints an arbitrator is to ensure that their point of view is put forward fairly and strongly. Therefore, once the arbitrators have reached a decision, the parties should agree to abide by it. This clause should be clear and succinct:

12(6) The contracting parties undertake to abide by the decision of the [arbitrators] (arbitration tribunal)

Or, this clause may be more strongly:

The decision of the [arbitrators (arbitration tribunal) shall be final, and binding on both parties.

### 10.8.8 Institutional Arbitration

The above method of the settlement of disputes is not however suitable for all types of agreements. It is increasingly being found unsuitable for investment agreements, because eventualities such as nationalisation may hit one party especially hard. In order for States to ensure that they shall be compensated fairly and promptly in the event of expropriation, and to avoid frictions that may occur between governments in pursuit of compensation, such disputes are increasingly being referred to multilateral agencies set up for those specific purposes. But for recourse to be had to such agencies (such as MIGA and ICSID) both parties to the agreement must be members of those agencies. In that event, after the clause stating that at first both parties shall attempt to settle their dispute by consultations, the following clause may follow:

> 12(2) If the contracting parties fail to reach a settlement [by consultations] (by negotiations) they shall submit their dispute to the Multilateral Investment Guarantee Agency (MIGA)

Because the statutes of these agencies almost invariably provide that members shall be bound by the decisions arrived at by those

agencies on disputes submitted to them, it is not necessary to have a further clause in the arbitration clause stating that. But in the event that neither of the drafters are sure as to the existence of such provisions, the drafting rule of thumb should apply: that it is better to err on the side of inclusion than on the side of exclusion.

## 10.9 Language and Authenticity

Where an agreement is being done in two languages, there must always be a clause reflecting that reality. The more important use of the language clause however is its statement as to which of the two languages will prevail in the event that there is a dispute or a disagreement.

The decision as to which text will prevail is a matter for the parties to the agreement to agree upon. Either both languages will be equally authentic or one of them will prevail in the event of disagreement or conflict in the texts. The language and authenticity clause should be clear on this:

> 13) This Agreement is done in the English and French languages, both texts being equally authentic.

Or, where one text will prevail in the case of conflict:

13) This Agreement is done in English and French languages. In [the event of] (case of) a conflict between the two the [English (French) text will prevail.

The Same Language

Where the agreement is in the same language, that fact may be reflected in the agreement, with the additional information that both copies are in the original. This is however not absolutely necessary and probably reflects more the style and elegance of approach of the drafter than anything else:

13) DONE in two originals in the English language.

## 10.10 Order of Drafting Final Clauses

Final clauses in agreements (whether bilateral or multilateral) should be drafted in logical order. The best principle to apply in deciding on the order is that they should be drafted in the order in which the events that they refer to occur (or may occur). The following order is suggested:

1. Arbitration clause
2. Amendments clause
3. Termination clause
4. Duration and Review
5. Entry into force

6. Language and Authenticity.

Other clauses which have been mentioned earlier fit in under these heads, and where they are found necessary, they should be inserted under the appropriate.

## 10.11 Miscellaneous Matters

There are certain matters which although not substantive drafting matters should be considered, and borne in mind when drafting agreements. These are matters of elegance, which should nevertheless be mentioned.

### 10.11.0 Annexes

Some agreements will by their nature require annexes to be attached to them. Where this is the case, there should be a brief annex clause stating that the annex(s) form an integral part of the agreement. This matter is of some importance because such a clause means that the provisions of the agreement regarding things such as amendments and termination will apply equally to the annexes.

### 10.11.1 Headings to Articles

In order to facilitate easy reading of the agreements and

reference to it, it is a good drafting practice to insert a heading for each article. Where headings are inserted, this should be done immediately under the number of the article, and at the centre of the page.

ARTICLE 12

Settlement of Disputes

The substantive part of the article then follows in the normal way.

10.11.3 Chapters

If an agreement is a long one and where there are a group of articles dealing with related subjects a chapter heading may be inserted immediately above the number of the article preceding a series of articles on the same subject. Thus for instance, in an agreement dealing with the privileges and immunities of an organization the arrangement would be as follows:

CHAPTER II: IMMUNITIES

Article 5

Immunities for Officials

This should be followed consistently throughout the agreement.

## CHAPTER XI

## SIGNING AGREEMENTS

11.0 After the agreement has been drafted and is ready for signature, there are a few formal requirements that the good draftsman should have borne in mind during drafting. Although not all directly have to do with drafting, the good drafter should make sure that they are done properly, since he must always see his agreement through to completion.

### 11.1.0 Signing Agreements

It is universal practice that in the agreement to be retained, the name of the retaining country or organization appears on the left on the signature page, and similarly in the heading of the agreement. Thus, in an agreement signed between Basanga and Ruritania on technical cooperation, the heading of the copy to be retained by Basanga would read:

> AGREEMENT BETWEEN THE PEOPLE'S REPUBLIC OF BASANGA AND THE REPUBLIC OF RURITANIA ON TECHNICAL COOPERATION.

Similarly, the signature page the agreement would read:

| | |
|---|---|
| Levi MZALENDO<br>MINISTER FOR FOREIGN AFFAIRS<br>FOR THE PEOPLES REPUBLIC<br>OF BASANGA | Matatu MINGI<br>MINISTER FOR FOREIGN AFFAIRS<br>FOR THE REPUBLIC OF<br>RURITANIA |

It must be ensured that the first paragraph of the preamble follows the same pattern, if only to ensure the consistency of this practice.

### 10.1.1 Initialling Agreements

Where the parties who have negotiated an agreement are not authorized to sign it, the heads of the respective delegations should initial each page of the agreed text of the agreement. The essence of this practice is to ensure that the wording in that text is the one agreed upon and the one that will be in the signed agreement. The same rule applies as with signing. The heads of delegation should affix their initials on the bottom left margin of every page of the copy of the agreement that they will retain, and on the bottom right margin of every page of the copy that the other side will keep.

### 11.1.2 Agreed Minutes

These same rules apply to agreed minutes. The only

difference here is that the heads of delegations actually sign the minutes; but as a matter of good practice, they should also initial every page of the text of the Agreed Minutes, and in the manner stated above. Initials should also be affixed on any annexes to the agreed minutes.

### 11.1.3 Copies of Agreements

Where an agreement has been done in two originals great care must be taken to ensure that every page, and every paragraph of the two originals correspond. This ensures that a party quoting particular provisions of the agreement will have the same reference. Thus a reference such as Page 6, Article 3 line 5, should yield similar provisions in both agreements.

Where agreements have been done on computer, this is not a particularly difficult thing to ensure. However, where they are typewritten it is easy to overlook this type of alignment and for this reason, typewritten agreements should be given greater care.