PRELIMINARY DRAFT

INTERNATIONAL TRADE NEGOTIATIONS
Training Manual

©
William W. Monning
&
Geza Feketekuty

DRAFT-5

11-02-02

I. Introduction and Purpose

Negotiations lie at the heart of international diplomacy. Parties (governments, businesses, and nongovernmental organizations) employ the art and science of negotiation to protect and advance their organizational and constituent interests. The skillful use of negotiation can advance a party's interests and help to avoid a less attractive alternative, e.g., trade wars, litigation, or protracted dispute settlement procedures under the WTO.

An effective negotiation process can lead to positive outcomes that can result in the promotion of important international objectives including economic development, business interests, environmental protection, labor rights, and political stability, all of which can minimize the adverse impacts of poverty that can lead to violence and war.

Even for students and practitioners who may not aspire to the role of negotiator in the heavy stakes arenas of international negotiation, most professionals negotiate frequently in the performance of their jobs. Whether negotiating for a raise, a vacation, or a promotion with a supervisor or negotiating with peers and subordinates over work assignments, deadlines, or workplace conflicts, we all negotiate all the time. No training manual can guarantee success in any particular negotiating setting, but everyone can improve their negotiating skills to increase the probability of successful outcomes.

A first step in approaching the improvement of your own negotiating technique is to develop an awareness or mindfulness of when you are engaged in a negotiation of small or large consequence. Many people undercut their own self-interest by not paying attention to their own role and participation in day to day negotiating scenarios.

Depending on the subject matter of a negotiation, different skills must be employed and options exercised to achieve agreement between or among parties. International negotiations in the broad context of trade relations may include negotiations over prices, tariffs, and sales or qualitative negotiations over broad principles related to the environmental, labor, health & safety, or other impacts of trade related agreements.

The purpose of this manual is to provide the reader and practitioner with the following analytical and practical skills:

- Problem identification and development of negotiation goals and strategies
- Identification of parties (stakeholders) and their respective interests and priorities
- Development of multiple options (solutions) that will maximize the probability of positive outcomes for all parties to the process
- Development of specific skills in the following areas:
    - Negotiation strategy
    - Pre-negotiation research and planning
    - Negotiation skills and technique to be employed throughout the negotiation process
    - Crafting and drafting durable agreements with an emphasis on successful implementation of the agreement

This manual includes various examples and simulations designed to assist the student and practitioner in how to adapt the theory of principled negotiation to effective practice and success in the negotiation process.

While the focus of this manual revolves around trade-related negotiations in the international arena, the applications of these analytical and skills sets may assist those engaged in a multitude of different negotiation scenarios.

It is the strong belief of the authors that practice is at the core of an effective negotiation technique. We believe that the use of simulation exercises can be of great benefit to the student of international negotiation. As in the practice of any discipline in politics, art, or sports, the most successful players are those who have learned from repetition of methodical practice. One can gain only a certain level of understanding by acquiring a theoretical knowledge of any discipline. The true practitioner perfects his/her skill and expertise through the repetitive drilling that gives meaning to the axiom that “practice makes perfect”.

We share this manual with all interested students and practitioners with the confidence that through the development and practice of the art and science of interest-based negotiations, the world can be made a better, healthier, and safer place to live.

We welcome your comments and feedback, stories of your successes and failures alike. By developing a repository of information we expect that this manual will benefit from revisions, refinements, and the collective inputs of those in the growing community of international negotiators.

II. The Role and Development of Negotiations in Commercial Diplomacy

Before exploring the other elements of interest-based negotiations, it is essential to describe the range of negotiations that occur in the international and trade arenas.

There are profound differences in the subject matter negotiated in international trade and investment in the character of the negotiations, as well as in the level and formality of various levels of negotiations. These differences have important implications for the optimal choice of negotiating strategies.

Most international transactions that involve trade and investment are negotiated between private parties: between buyer and seller, importer and exporter, employer and employee, contractor and subcontractor. The negotiation of international commercial transactions is the substance of international business, and is best covered in business management textbooks. They are not covered here.

This manual addresses the negotiation of policy measures that affect international trade and investment. The negotiation of trade-related policy issues primarily centers on the reconciliation of trade-based economic objectives and broader public policy objectives such as health, safety, and the social welfare of disadvantaged groups in society. These different interests of society are reconciled through a complex negotiating process that takes place within and between domestic stakeholder groups such as businesses, unions, civic groups and government agencies, and ultimately between national governments. The special character of commercial diplomacy is that it encompasses both private stakeholders and governments, that it addresses both private commercial interests and public policy interests, and that the outcome is arbitrated through both economic markets and political markets. Negotiations in commercial diplomacy cover business issues, policy issues, broad economic issues and political issues, as well as legal issues.

Negotiations in commercial diplomacy potentially involve a wide range of stakeholders – the groups who represent the commercial interests, policy interests, political interests, economic interests, legal interests and institutional/bureaucratic interests affected by trade and investment policy decisions. Each of these groups seeks to influence the policy outcome through negotiations. The most visible negotiations carried out in the trade policy arena are the negotiations carried out between governments, either bilaterally or multilaterally. Such government to government negotiations, however, are preceded by intense negotiations within the individual countries on the country's negotiating position. These internal negotiations often start within the individual firms, industry associations, government agencies, legislative committees, and non-governmental organizations that have a stake, and are followed by the negotiation and formation of policy oriented coalitions among stakeholders for the purpose of influencing the policy outcome. The negotiations to form these coalitions can cross national borders, and involve business leaders, academics, politicians, bureaucrats, and leaders of civil society from many different countries. Coalitions that cross national borders seek to influence the respective governments in parallel. Private

stakeholders, whether acting on their own or as representatives of a coalition, negotiate with the various government agencies and politicians involved in the decision making process and ultimately these government agencies and politicians negotiate with each other to arrive at a negotiating position for their country. Often these internal negotiations are much tougher and take a lot more time than the more visible government to government negotiations.

Each of the stakeholder groups involved in the trade policy advocacy, decision-making and negotiating process brings their own motivations and interests to bear on the negotiations. As we shall explore more fully later, these interests and motivations are the key to a structured approach to negotiations that has the highest prospects for a satisfactory outcome. The interests and motivations that influence the positions of many stakeholders in the private sector are fairly straightforward, and not too difficult to analyze. The interests and motivations of governments are often much more difficult to identify because governments represent all the various interests of society. Nevertheless, there is a great deal of consistency across governments with respect to the principal interests represented by government agencies and departments responsible for particular areas of government policy. The successful negotiator will prepare himself or herself by carefully analyzing the interests and political influence of each of the principal stakeholder groups.

Most negotiations in commercial diplomacy are over the impact of specific policy measures on particular products or industries. The negotiation of such trade or investment related policy issues typically starts as a negotiation between an affected enterprise or industry and the government responsible for the targeted policy measure. If the issue is not resolved at that level, the home government of the affected enterprise or industry may step into the dispute by initiating government to government negotiations. These kinds of negotiations usually go through a number of different phases that call for different negotiating attitudes and tactics.

The first contact is usually best approached as an informal information gathering effort. After all, the enterprise managers may be ill informed about the specific regulations or laws at issue, or the administrative guidelines followed by the responsible officials. Conversely, the officials involved may be ill informed about the production methods or business practices covered by the regulations.

Once the facts have been clarified, and a policy issue has been identified, the negotiation should move into a problem-solving phase. A problem-solving approach, which suspends value judgments about who is right or wrong, encourages flexibility by the negotiating partners, maximizing the chances that an amicable resolution can be found that simultaneously preserves the policy objectives of the government and the commercial objectives of the enterprises involved in the negotiation. The best tactics to use in this type of a “win-win negotiation” will be explored later. Of course, some policy issues raised by exporters or investors are without merit, while other policy actions taken by governments are not very defensible. In these situations, sometimes the best resolution is a graceful withdrawal before issues of face and prestige make such a withdrawal difficult.

If efforts to resolve the issue through a problem solving approach fail, the negotiations may move into a third, more formal stage of negotiation, during which the negotiators may increase the political and legal pressure on the other side. There is an increased risk at this stage that the negotiation may turn into a zero sum game type of negotiation, in which one side or the other has to lose in order to secure a resolution of the issue. As we shall see later, zero sum type of negotiations are more difficult to conclude, and a successful negotiator will keep emphasizing the potential for a win-win outcome.

A negotiation that remains deadlocked may be referred to a dispute settlement process. Many trade and investment agreements identify a process for settling disputes that cannot be resolved through negotiations. Some forms of dispute settlement, such as arbitration and mediation, are a structured and assisted form of negotiation.

While most day-to-day negotiations between governments on international commercial issues focus on specific commercial problems created by specific policy measures, the negotiations that get the most attention are comprehensive government to government negotiations that cover a wide range of products and policy issues. Examples are bilateral free trade negotiations aimed at removing most barriers to trade and investment between countries, or the multilateral rounds of trade negotiations carried out under the auspices of the world trade negotiations. These negotiations typically address both the reduction and elimination of a wide range of trade barriers and the negotiation of trade rules. These negotiations by their very character have to be approached as win-win negotiations, because no deal is possible without each party agreeing that the proposed agreement is in its interest. Rules-based negotiations, in particular, have to start from the identification of common interests that might be advanced through the adoption of the rule

Another type of negotiation in commercial diplomacy is one in which one government seeks to eliminate, or at a minimum to moderate, a restrictive trade policy action by another government. On its face, this kind of negotiation is set up as a zero sum game type of negotiation, and it takes extraordinary skill to convert it into a win-win negotiation. Assuming that the proposed measure has some degree of merit in light of the economic circumstances faced by the country involved, the trick is to show that negotiations can lead to a more balanced consideration of the interests of all parties involved.

Another type of negotiation might be one between a stakeholder left out of an agreement and the parties to a negotiated agreement. The aggrieved stakeholder could be a country adversely affected by a bilateral agreement between two other countries, or a non-governmental organization that believes its policy interests have not been adequately considered by the government and business representatives that worked out the deal. Commercial diplomats representing parties not invited to the negotiating table need to consider what tactics might get them invited to the table. Ultimately, this means, that they need to consider how they might identify and mobilize potential allies with the necessary political influence.

Each of these various types of negotiations call for a different negotiating style, and different negotiating skills. Negotiations aimed at defining common interests – whether that involves the negotiation of a coalition, the negotiation of a common course of action or the negotiation of common principles or rules, requires a soft sales approach that emphasizes common interests and engenders a great deal of mutual trust among negotiators on the genuine commitment of the negotiating partners to the advocated goals. Negotiations over tariffs and quotas requires a more hard-nosed approach that demonstrates to all stakeholders that the negotiated outcome was the best that could be achieved under the circumstances. Problem solving negotiations fall somewhere in between. Each side to the negotiations must defend its interests, but also has to be able to demonstrate that both sides can gain from both the policy and the commercial aspects of an agreement.

Understanding the nature of the parties and the subject matter of the negotiation is critical to the process of planning and preparation for a formal negotiation session.

Terminology and descriptions of the various types of parties and form of negotiation follow:

1) **Inter-governmental negotiations** – between governments the government of Pakistan negotiates with the government of India
2) **Intra-governmental negotiations** – within and among one government, usually between government agencies, political parties, or with constituent groups.
3) **Commercial negotiations** – between businesses, companies, corporations. This may include business negotiations related to contracts, sales agreements, investments, joint ventures, etc. Or, may involve negotiations within a business or trade association.
4) **Internal business negotiations** – Within the business organization, company or corporation. Examples: management – labor negotiations, human resources, inter-departmental, union negotiations, etc.
5) **Nongovernmental Organizations (NGOs)-**business associations, trade associations, environmental, labor, human rights, development, etc.)

   Intra-group (within the NGO)

   a) Inter-group – between and among other NGOs
   b) NGO-business organization
   c) NGO-governmental organization
   d) NGO-international governmental body (WTO, UN, WHO, ASEAN, etc)

Differences in Players, Resources, Styles, and Motivations

With each identified type of negotiation and potential interest group involvement there will emerge different negotiating styles, techniques, and cultures.

It stands to reason that groups of like-function (government to government) will employ more similar negotiating styles and protocols than groups that cross functional, experiential, and interest-based lines of demarcation.

As groups cross from negotiations with familiar counterparts to dissimilar counterparts, the cadence of the negotiating dance will more likely be dissonant. In other words, people feel more comfortable negotiating with counterparts performing a similar role and dealing with like subject matter than with those representing different subject, professional, and cultural differences.

It is one thing to acknowledge the differences inherent in a cross-over in negotiating with a group of different interest and professional focus—it is quite another to adapt one's negotiating style and technique to accommodate or at least function with negotiators of diverse interest groups.

As discussed, supra, a diplomatic culture exists among officials representing various governments. While language, background, and cultural differences may exist, the diplomatic culture plays upon common experience, educational training, and acceptance of protocols developed over decades so that negotiators can work with one another in an atmosphere that is predictable and based upon certain accepted norms, routines, and behaviors.

While the subject of a trade dispute may not change, the parties to negotiations may vary from governmental representatives meeting with each other one day and those same representatives meeting with a cast of business or NGO representatives the next. While the differences should not be ignored, they can perhaps be minimized by planning and charting the divergent interests, histories, goals, and objectives.

III An Overview of Trade Negotiations

Press reports often focus on high profile negotiations aimed at global or regional reductions in trade barriers or the resolution of highly charged trade disputes between governments. Most of the work of trade negotiators is focused on more mundane trade related policy issues that concern particular firms or industries. This chapter is intended to provide an overview of the type of negotiations common in trade policy, and the characteristics of such negotiations.

Bilateral Problem-Solving Negotiations

A considerable amount of time of every trade official is taken up in addressing specific problems that arise from the application of domestic regulatory measures to internationally traded goods and services. Such problems can come to the attention of a trade negotiator as an affected entrepreneur raises the issue with the official responsible for a particular area of trade or trade with a particular country. Alternatively, the entrepreneur may first raise the issue with intermediaries such as legislators, party officials, or trade lawyers. If the trade negotiator is persuaded that the problem constitutes a legitimate trade issue it may be added to the agenda of bilateral issues with the country concerned.

Initial consultations with officials of the other country may reveal that the problem is not really a problem. The perceived problem may be the result of poor communications between the foreign entrepreneur and domestic regulatory officials, or that the adverse trade impact is an unavoidable consequence of a legitimate regulatory action. Alternatively, initial consultations may reveal that the problem is a genuine trade barrier, i.e. that the measure was intended to restrain trade, or if the adverse trade effect was unintended, that the adverse trade effects could be reduced or eliminated through the adoption of alternative, less trade distorting, policy tools.

.

Bilateral problem solving negotiations go through several phases. In the first phase, the initial information sharing stage, the parties seek to determine if there is a problem, and where there is a genuine problem, the specific measure that is causing the problem, the policy objectives served by the measure, and the commercial problem created by the measure. In the second phase, the problem solving stage, the negotiators seek to determine if there is a win-win solution that would reduce or eliminate the trade problem without compromising the policy objectives served by the measure. Ideally, less trade distorting policy measures are available that can be substituted for the more trade distorting measures, without compromising the desired policy outcome. In the third phase, the hard-nosed negotiating phase, the parties explore the positive outcomes that could be derived from solving the problem on one hand, and the negative consequences of not solving the problem. Positive outcomes could include an improved relationship between the two countries and the resolution of other issues where the importing country needs the help of trade officials in the exporting country (you help me and I help you). Negative outcomes could include a worsening of trade relationships, a negative impact on efforts to resolve other issues of particular interest to the importing country, and submission of the issue to a dispute settlement panel in the WTO if the complaining country believes it has a strong legal case under WTO rules. In the fourth phase, the dispute resolution phase, the parties submit their dispute to a dispute-settlement process. In a fifth phase, the implementation phase, the parties may need to discuss the implementation of a solution or the fallout from a failure to solve the problem.

Many issues get resolved at the first stage, others at the second or third stage. Only a small percentage of cases go to actual dispute settlement, and only a fraction of those end up with some form of retaliation. The bulk of the issues are resolved because countries realize this is a two way street, and in many cases both sides can gain the exporting country with more exports, and the importing country with more imports of needed goods and services and better regulations.

The nature of the negotiating process and the negotiating tactics change as you move from the first to the last phase. At the beginning of the process, the emphasis is on win-win solutions. At the beginning of the process, when you are seeking to obtain information from counterpart negotiators or to obtain their help in solving the problem, it would obviously be a mistake to approach them in a confrontational or hard-nosed way. As the negotiations move to hard bargaining and dispute settlement, the negotiations take on more of a zero sum mentality. As we argue elsewhere, however, in most situations it pays to preserve a win-win mentality as long as possible, even as the negotiating process leads to hard nosed bargaining and dispute settlement. After all, in many, if not in most cases, failure to resolve the issue is not the result of ill will by the trade officials on the other side, but rather the result of real difficulties in solving the many political, legal, policy, and public opinion issues that may stand in the way. By communicating to your counterpart negotiators that you understand their difficulties, and that you and they face the common challenge of finding a solution that meets the needs of both sides, you increase the chances that they will work with you rather than against you.

No matter how easy the solution to a problem appears, it is useful to remember that all negotiated outcomes involve a cost for the other side. Even if the solution is obvious and does not involve major difficulties to implement, the trade negotiator on the other side has to take the time to explain the problem to colleagues, superiors, regulatory officials responsible for administering the disputed regulation, and private stakeholders. Your counterpart may have to ask for their support in solving the problem, thus incurring a reciprocal obligation to such stakeholders to help them solve one of their problems in the future. In other words, by proactively pushing for a solution, your counterpart is likely to incur political costs. The more difficult the issue is to resolve, the higher the political costs incurred. As the political cots rise for the other side, so does the political cost for the complaining country.

One consequence of the escalation of political costs is that the issue is pushed to more senior officials in both governments, ultimately to cabinet ministers and heads of government. At each step of the way, the complaining country must consider whether the expected benefits from solving the issue warrant the increased human resource and political costs it will incur – costs in terms of the scarce time of the officials concerned, the expectation of reciprocal favors by the other government, or negative fallout for other issues being negotiated by the two governments. Obviously, only the most important issues survive this test.

Bilateral Negotiations Aimed at Mutual Reductions in Trade Barriers.

In contrast to problem solving negotiations, negotiations aimed at the mutual reduction of trade barriers between two countries usually cover a wide range of products and industries. Moreover, unlike the problem solving negotiations, which usually take place in response to a complaint brought by an enterprise seeking to export its goods or to invest abroad, negotiations between countries aimed at the mutual reduction

of trade barriers are usually initiated by the governments involved. The two governments thus recognize from the outset their mutual interest in reciprocal reductions in trade barriers. One example is a bilateral free trade negotiation. Another example is a bilateral negotiation carried out between members of the WTO in the context of multilateral trade negotiations.

Bilateral negotiations aimed at the mutual reduction of trade barriers take place in an overall win-win framework, but they inevitably involve gains for some domestic stakeholders such as exporters or domestic consumers of imported products, and losses for other stakeholders such as domestic producers of competitive products in each country. Negotiators on both sides are expected to maximize the gains and to minimize the losses for their side. While economists would argue that both sides gain, whatever the impact on winners and losers in each country, the political economic reality is that losers are often in a position to block outcomes that do not take into account their interests. While winners can always trump losers where the potential gains a large enough, it is useful in a democratic society to persuade losers that the outcome is just. This usually means accommodating them in some way, while persuading them that a successful negotiating outcome is in the interests of the country as a whole. A good negotiator is able to gain their support through a combination of offers and threats – an offer to make less of a cut in the trade barrier than might be possible if they acquiesce and a threat to ignore their interests if they chose to oppose the agreement actively.

Negotiations over the mutual reduction of trade barriers thus always involve hard bargaining, both at home and internationally. In light of the stakes for winners and losers, they inevitably take on a zero-sum mentality. Negotiators in such situations must always remind themselves that the desired outcome is a win-win solution for the country as a whole, consistent with an acceptable distribution of gains and losses among stakeholders. The challenge of the negotiator is to achieve such an outcome for both sides, since both sides have to be satisfied with the outcome. The role of the negotiator is to let the other side know what is required to achieve a successful outcome, both in terms of the expected gains for exporters and what would constitute unacceptable losses for import competing industries. Equipped with information about each side's needs, the two negotiators then have the task of identifying an outcome that will maximize the potential increase in trade, while meeting the domestic political requirements of each side.

The most important requirements for a successful outcome in such negotiations are a detailed analysis of the interests of stakeholders in both countries, and comprehensive consultations with affected stakeholders on desired and achievable results. Good information about stakeholder interests in the other country will strengthen a negotiator's hand in negotiations with counterparts, and provide the raw material for developing win-win solutions. Consultations with stakeholders will earn the negotiator the support of stakeholders when the negotiated agreement is tested politically at home.

Multilateral Negotiation of Trade Rules

Another typical negotiating format in trade is the multilateral negotiation of trade (or investment) rules. By multilateral we mean a number of countries meeting as a group to develop rules that will bind the participating countries. The rationale for such rules is that every member will be better off if all other members adhere to an agreed rule and avoid beggar thy neighbor policies that might benefit an individual country in the short run, but would harm the country in the long run if other countries decide to pursue the same course. By its very nature, such

a negotiation has to be approached as a win-win type of negotiation, because in most such negotiations every country has to agree in order for the rule to be adopted.

The various rounds of multilateral trade negotiations carried out under the auspices of the World Trade Organization (previously the GATT) are examples of such negotiations. Other examples are negotiations carried out by members of regional trade agreements such as NAFTA, the European Union, Mercosur, and the Free Trade Agreement of the Americas (FTAA). Multilateral negotiations in other trade oriented organizations such as APEC and the OECD follow similar patterns, though they typically result in voluntary best effort commitments and "recommendations" rather than legally binding obligations of member governments.

Multilateral negotiations of rules usually go through several phases. In the first phase, the issue identification stage, one country typically identifies an issue or problem, which it believes needs to be addressed through the formulation of a rule, or some other form of common action. In order to persuade other governments to embark on an analysis of the issue that could lead to the negotiation of a rule, proponents have to demonstrate that the identified problem or issue is more than a one time or rare event, that it is potentially a problem for every (or most) countries, that it is a more serious than a trivial problem for member countries, that the nature of the problem and the potential remedy is fairly consistent over time and across countries, and that the problem can be solved through a negotiated rule or agreement. If the problem is rare, member countries will be reluctant to spend the time to analyze and negotiate the issue and to restrict their future freedom of action. If it is only a problem for one or some countries, but not for a majority of countries, it will be difficult to get an agreement to study the issue, much less to negotiate binding commitments. If the nature of the problem and the appropriate remedy changes from event to event, opponents will argue that while there may be a problem, rule making is not the answer.

In the second phase, the analysis phase, the negotiators analyze the nature of the problem and the potential remedies. This phase of the negotiation is designed to create a clear understanding of the problem and how it may be addressed. In the WTO an issue at this stage of the process will be entrusted to a study group. Members will study historical occurrences of the problem, identify patterns, examine analogies to similar problems that have been addressed through negotiated agreements, and evaluate principles that could serve as the basis for rule making. If member countries are persuaded by this work that the problem is serious, that it is consistent over time, that it is widespread among member countries, that it can be remedied through some form of agreement, then discussions will move toward the search for a negotiating framework to address the issue.

In the third phase, the pre-negotiation phase, member countries hammer out the terms and mandate for the negotiations. In the WTO the issue at this stage is often entrusted to a working group or a committee that has a formal standing within the organization. The work of the group is to define the problem to be addressed, to identify the nature of the solution to be pursued through negotiations, the specific elements of the issue to be addressed, the components of a negotiated solution, and a timetable and venue for the negotiations.

In the fourth phase, the negotiating phase, member countries negotiate the actual provisions that will be added to the trade agreement. Such negotiations usually start with a consideration of negotiating proposals tabled by member countries. Where there are many such proposals, the Secretariat may be asked to compile the proposals into an integrated document, and to provide members with an analysis of the various

proposals. A discussion of these proposals can lead to a second tier of proposals, which incorporate comments made by members during the review of the initial proposals, or which seek to bridge the gap between competing proposals.

Success in multilateral rule making negotiations, like success in bilateral negotiations aimed at the mutual reduction of trade barriers, hinges on an in depth analysis of stakeholder interests and comprehensive consultations with stakeholders. Success also requires proactive leadership in the negotiations in tabling analytical papers, policy white papers (which lay out the nature of the problem and proposed solutions), concept papers (which propose concepts and principles that can be used in framing rules or other negotiating solutions), negotiating proposals, and draft texts. A successful negotiator will also actively seek out multiple opportunities for informing the wide range of domestic and foreign stakeholders of the negotiating issues, the benefits to be derived from a positive negotiating outcome, the potential negotiating outcomes, and their rationale. The methods for communicating with stakeholders include use of web sites, speeches, published articles, hearings, meetings with stakeholder groups, academic conferences, and intimate weekend seminars and roundtables with key stakeholders. One of the authors of this manual used every one of these techniques in building a global consensus in support of negotiating the WTO agreement on services.

IV. Elements of Interest-based negotiations

What is interest-based negotiation? The theory and practice of interest-based negotiation is a relatively new addition to the academic literature related to international diplomacy. Many of the elements discussed in this manual were developed and refined by the Harvard Negotiation Program and members of a growing consortium of academics and practitioners devoted to the development of negotiation as a science. We acknowledge those contributions as we seek to build upon them in their application to trade-related negotiations and conflict resolution in the international arena.

Interest-based negotiation is based upon a simple premise. No one wants to "lose" or sacrifice his or her interests in a negotiation process. In a "zero sum" gain type of negotiation, one party succeeds at the expense of the other party who makes all the concessions or compromises to the detriment of their interests.

By recognizing the fundamental human desire to be successful, the art and science of interest-based negotiations has evolved. By understanding the interests of all parties to a negotiation (often diverse interests), a negotiator can better formulate "positive sum" approaches that allow all parties to advance and protect some, if not all, of their interests. Such "positive sum gain" approaches to negotiations have been coined as "win-win" negotiations.

No two negotiations are the same. Even with common facts and negotiating instructions, the personalities of negotiators can advance or impede the negotiation process. The excessive ambition of a single bureaucrat, or the aggressive or ill temperment of one negotiator can affect and influence an entire negotiation. As part of the preparation and planning process related to interest-based negotiations, the requirements of individual negotiating behavior must be explored relative to the broader interests of groups that have a stake in the negotiation and its outcome.

Traditional, competitive negotiations pit negotiators against each other as adversaries who seek to win concessions at the expense of their counter-part. Parties seek to discover the "bottom line" of their counterpart in an attempt to extract the maximum concession possible. A party with "superior negotiating power" might be able to negotiate their counterpart into submission, but such an approach often leads to *impasse* (the failure to reach an agreement) as parties become entrenched in intractable positions, or alternatively, the negotiation of an unequal agreement will leave a legacy of distrust and resentment.

Interest-based negotiation is rooted in the recognition that parties invariably have divergent as well as shared interests. By understanding the interests of all parties in a negotiation process, the skilled negotiator is often able to craft solutions (options) that will satisfy some, if not all of the counterpart's interests, thus demonstrating the benefits of remaining engaged in the negotiation process. By

working cooperatively in the quest for workable solutions, the skilled negotiator is able to articulate the interests and needs of not only his/her own party, but also of all parties to the negotiation.

In the parlance of the authors of *Getting to Yes, Negotiating Agreements Without Giving In* (1), the goal of interest-based negotiation is to "separate the people from the problem" by expanding the pie of possible solutions. The skilled negotiator works to move the parties away from judgmental or pre-determined positions to a more pragmatic approach that recognizes the common interest and benefit of a negotiated agreement.

An effective negotiation is one that is efficient in terms of the investment of time and resources, particularly when compared to options available to the parties in the absence of negotiations. (The "walk away" alternative, called a BATNA- best alternative to a negotiated agreement). As will be discussed in greater detail, *infra*, negotiators must develop the skill of evaluating the benefits of a negotiated agreement compared to the alternative conflict situations that are likely to emerge in the absence of negotiations.

In the development of an interest-based approach to the negotiation process, the negotiator who faces entrenched and positional negotiators can gain a negotiating advantage by employing an analytical and problem solving approach. In fact, while the benefits of parties sharing an interest-based approach to negotiation become immediately apparent, it is the success of the technique with recalcitrant and positional parties that proves its ultimate efficacy.

In the following sections, the various elements of interest-based negotiation will be identified and discussed. Regardless of the nature of the negotiation, the setting, or the cultures involved, every negotiation will include the following elements: people (parties, stakeholders), interests, options or possible solutions to satisfy interests, a BATNA or best alternative(s) to a negotiated agreement, and various objective criteria that may be employed to provide support for a proposal or to reduce the legitimacy or applicability of a proposal.

Stakeholder Identification and Analysis (the people and organizations)

1. *Who are the stakeholders? The people and organizations involved in the negotiation process.*

A stakeholder can be defined as any person or entity that has a vested interest or investment in the outcome of the negotiations. A stakeholder will be impacted either positively, negatively, or not at all, depending on how the issues discussed at the negotiating table relate to their interests.

By their very nature, international negotiations involve people of different national, ethnic, racial, religious, and cultural backgrounds. These people, in turn, represent governments, businesses, NGOs, and other entities that have a stake or interest in the outcome of the negotiations. While the individual people involved in the negotiation process bring their own backgrounds, personalities, training,

ambitions, and self-interests to the table, their mission is to serve as representatives of r organizations, bureaucracies, or enterprises to whom they are accountable.

The parties most directly involved in international trade negotiations that cover trade-related policy issues are government representatives. Government representatives in formal international trade negotiations are usually from the ministries of foreign trade, economics, foreign affairs, or in the United States, the Office of the U.S. Trade Representative (USTR) which is a cabinet level position within the executive branch of government. The USTR is appointed by the President of the United States and reports directly to the President.

While negotiations related to the interpretation and implementation of trade laws and regulations between and among nations are handled by each government's trade representatives, the broader process may include internal negotiations between different government agencies, political representatives, and nongovernmental interest groups, including but not limited to corporations or other enterprises, trade and business associations, labor unions, consumer groups, and nongovernmental organizations representing policy interests.

Negotiators engaged in formal inter-governmental negotiations are usually subject to the influence of multiple stakeholders who are not at the official negotiating table, but who exercise their influence through official or informal contacts with negotiators, public testimony, speeches, press releases, lobbying, legislative initiatives, grass roots campaigns, or other political activity to ensure that their interests are protected.

2. Who are the stakeholders and what is their influence on the negotiation process?

At the outset of developing a negotiation strategy, a good negotiator will identify <u>all</u> of the stakeholders and chart their interests, positions, and options. By understanding which parties (people and organizations) have an interest and potential influence on the negotiating process, a negotiator can generate a list of the interests that have to be accommodated in the course of either the internal or external negotiating process in order to achieve a successful outcome.

In international trade negotiations between governments, the stakeholder analysis needs to cover four sets of stakeholders: private stakeholders in the home country, government stakeholders in the home country, private stakeholders in all foreign countries involved in the negotiations, government stakeholders in all foreign countries involved in the negotiations. In some cases the secretariat of an international organization may become involved as a fifth set of stakeholders.

A simple graphic (2.1) illustrates the universe of potential stakeholders in an international trade negotiation related to the removal of agricultural trade barriers between the United States and Europe ---

United States	**European Union**
	Governmental stakeholders:
	Executive Branch
U.S. Administration	EU Commission
U.S. Trade Representative	DG for External
U.S. Department of Agriculture	
U.S. Dept of Commerce	
Treasury	
U.S. Dept of State	
	Other Governmental Stakeholders
Members of U.S. Congress	E.U. Parliament
House of Representatives	Council of Ministers
U.S. Senate	Member States
	Nongovernmental Stakeholders

Growers of Export Crops

Growers of Import Competing Crops

Food Processors

Manufacturers of Export Products

NGO's supporting Family Farms

<u>Other Stakeholders</u>

China

3. *Identification of Potential Coalition Partners and Allies*

An important aspect of the analysis of stakeholders is to identify those stakeholders who may serve as *coalition partners*. Coalition partners are those stakeholders with similar or shared interests whose participation in the process may add support and influence in the negotiation process. Similarly, it is important to identify potential coalition partners who may join with counterparts in the negotiation process.

Once the potential coalition partners of all parties to the negotiation have been identified, then it is important to reach out to your allies and discuss the pending negotiations. A coalition partner may support your efforts in some or all of the following ways:

- Help brainstorm possible solutions (options) to present in the negotiations
- Reach out to their constituents (members) to involve them in collateral legislative, lobbying, media, or other supportive activities
- Help to raise resources including funds to advance various aspects of a concerted campaign which will support the negotiators
- Provide market, scientific, research, and other data in support of the negotiating objectives.

Equally important is the identification of stakeholders with conflicting interests. Can they be approached and "neutralized"? E.g., Can you offer information, trade-offs, or other assurances that will minimize or eliminate their adverse influence on the negotiation process?

Coalition partners or negotiating partners may include other governments, business organizations, associations, NGOs, elected officials, agency representatives, members of the media, or members of the academic or epistemic community.

4. *Authority of the parties- Who are the individuals at the table and what is their authority?*

a. What is your negotiating authority?

A party's *authority* in the negotiation process indicates the power to make a binding or enforceable commitment. *Limited authority* means that a party does not have the power to fully commit their interest group to a binding decision.

It is essential to determine and clarify YOUR authority prior to entering a negotiation. Your authority is generally determined by your superior within a government bureaucracy, corporate organization, or NGO. You may be required to negotiate the terms of your negotiating authority within your organization, usually with a superior. It is not uncommon to represent your party with limited authority. Limited authority may require that any agreement be reviewed and approved by a superior or a committee before you receive authorization to sign the agreement.

With approval of the President and other political appointees the President may designate, U.S. government negotiators can commit the United States to an Executive Agreement, but not to a treaty or an agreement that changes U.S. law without approval by the Congress. An agreement that is to become a binding treaty agreement must be ratified (approved) by two-thirds of the U.S. Senate. (66 votes), and an agreement that changes U.S. law must be approved by a majority in both houses of Congress.

A skilled negotiator will use his/her limited authority to explore all options for agreement but will remind the counterpart(s) that no final or binding commitments can be made until approval from a higher authority (not present at the negotiating table) has been obtained.

[Note: The U.S. Congress recently voted (August 2002) to give the President of the United States (executive branch) *trade promotion authority (TPA),* sometimes called "fast track authority". This issue relates to the authority of the President's representative, the United States Trade Representative to negotiate trade agreements which the Congress may approve or disapprove, but which they may not amend or revise or delay through legislative maneuvers. Such authority conveys a message to potential trade partners: what they negotiate with a trade representative will NOT be amended or changed by Congressional action at a later date.]

b. What is your counterpart's negotiating authority?

And, while knowing the parameters of your negotiating authority is critical, determining the negotiating authority of your counterpart(s) is absolutely essential.

How do you discover the negotiating authority of your counterpart(s)? ***You ask!*** It is generally not in the interest of a counterpart to mislead or deceive a negotiating partner regarding their authority. If their authority is limited, they will want to communicate that to you so they protect their ability to test interim or provisional agreements without committing themselves to conclude the agreement without approval from higher authority.

Authority may also be deduced based on past practice, protocol, or by prior agreement. It can never hurt, however, to clarify your counterpart's authority.

The failure to determine your counterpart's authority, or yours, can lead to failure of the negotiations. A failed opportunity to conclude a negotiated agreement that represents the hard work of the parties is a wasted effort.

If you will be expected to gain approval of a higher authority before finalizing a negotiated agreement, you will need to agree to a time period during which you can seek approval or learn of concerns. It is also useful to ask your counterparts to whom they will have to present the terms and conditions of an interim or final agreement. Is that person reachable? How long will they need to review a proposal or interim agreement? Can they be reached by phone, cable, fax, email?

(***Practice tip***: Keeping notes and copies of proposed agreements on a laptop computer will make it easier to forward text for review and approval during the negotiating process.)

c. Use of limited authority can be used to your advantage.

The use of *limited authority* may be used to your advantage. By making it clear that any final agreement or interim agreements must be reviewed by an authority who is not present at the table, you can use your limited authority to seek the input of team mates and superiors before agreeing to final language, text, or other commitments. Similarly, by knowing of your counterpart's limited authority, you can float "trial balloons" (exploratory proposals) that your counterpart can be expected to convey to his/her superior. By obtaining feedback, questions, or other articulated concerns, amendments might be made during the course of the negotiation that may be missed under pressure to agree, but which will enhance the quality of the agreement and its durability.

d. Negotiating authority and the importance of speaking with "one voice".

Closely related to a party's negotiating authority, is the importance of a negotiating party speaking with one voice. A governmental delegation will most often be represented by a "head of delegation" who will also serve as the lead negotiator. It is of critical importance in negotiations for a team that may be composed of several members, to communicate and reflect a unified position at all times. Nothing will undermine a negotiating team's credibility more than an aura of disunity, disagreement, or other forms of dissension. If disunity or disagreement is observed by a counterpart negotiator, that negotiator will move to exploit those differences or will simply be confused by the team's inability to present a unified and coherent proposal or response.

(***Practice tip***: As part of your preparation and planning, be clear as to who will lead the delegation in the negotiations and who will speak on various agenda items. If there are questions during the process of an active negotiation, pass a note to the head of your delegation and suggest a break. Discuss differences, review proposals, and explore options within your team AWAY from the negotiating table.)

5. Cross-cultural dynamics, gender, and language as variants affecting the negotiation process.

International negotiations necessarily involve cross-cultural interactions that may affect the flow of a negotiation and the understanding of various parties to process, proposals, and agreements.

In the field of international trade law and practice, a *diplomatic culture* has developed which has served to minimize some of the barriers that cross-cultural dynamics may pose in business or other non-governmental negotiations. Diplomatic culture can be described as the universal culture of professional diplomats who often speak in a common language (English, French, Spanish) even if that language is not the diplomat's native language. Diplomats often maintain common habits associated with international diplomacy including western dress, common educational backgrounds, and familiarity with procedures and protocols associated with international law or rule-making.

But, even those who present themselves as part of this diplomatic culture may maintain strong cultural identification and habits with their native culture. Culture is manifest in many ways including orientation to time (monochronic v. polychronic), decision making process, formality of negotiation process, formality of decisions (oral agreement vs. written contract.), importance of age, language, preferences and attitudes toward food, music, sports, body language, etc.

The differences in negotiations and communications between various cultures is often categorized by low context vs. high context cultures. Stephen Weiss has grouped various communication styles associated with various cultures as represented in Graphic 5.1

Cultural Characteristics of Negotiation Communications

Low Context **High Context**

General Model

1. Basic Concept of Process

Distributive bargaining—joint problem solving---debate—contingency

Non-directive discussion

2. Most Significant type of issue

Substantive---relationship-based------procedural—personal-internal

Role of Individual

3. Selection of Negotiators

Knowledge/Negotiating experience/Personal attributes/Status

4. Individual's Aspirations

Individual ----------Community

5. Decision Making in Groups

Authoritative ----------Consensual

Interaction: Dispositions

6. Orientation toward Time

Monochronic----------Polychronic

7. Risk-taking Propensity

High----------Low

8. Bases of Trust

External sanctions/ Other's reputation/ Intuition/Shared experiences

Interaction: Process

9. Concern with Protocol

Informal----------Formal

10. Communication Complexity

Low----------High

11. Nature of Persuasion

Direct experience/ Logic / Tradition /Dogma/ Emotion/ Intuition

Outcome

12. Form of Agreement

Contractual----------Implicit

Stephen E. Weiss, Negotiating with Romans, Sloan Management Review. (2)

Combined with cross-cultural issues that may affect the negotiation process is the difference in the role of men and women in various cultures. Gender dynamics may be of little importance or of profound significance depending upon the culture. (3)

Language and the choice of language used in international negotiations is also an important variant in the potential success or failure of a negotiation process. Today, the diplomatic culture increasingly relies on English as the common language for inter-governmental negotiations. This may, of course, vary if all participants are South European, Latin American or from a Francophone country or the former Soviet Union ,. The important lesson to be learned with respect to language as a variant in international negotiations, is that people possess varying degrees of fluency. If a person is not negotiating in their native language, the potential for misunderstanding increases.

Negotiators often are confused or misunderstand the intent of a counterpart negotiator even when negotiating in a shared common language. When negotiating with a party or parties who do not share a common language, the potential for misunderstanding increases. Even with skilled, professional interpreters, a literally accurate interpretation may not convey the meaning or nuance intended by the speaker.

How can a negotiator be sure that his/her words are being understood as they are intended? Speaking slowly, rephrasing what the counterpart negotiator has said in the negotiator's own words, reviewing written text, and use of interpreters (oral) and translators (written) represent non-exclusive options to minimize error or misunderstanding.

(***Practice tip***: Never assume that a counterpart has understood a proposal as intended, especially when using interpreters. Repeat, review, and invite the counterpart to articulate their understanding of your offer, proposal, etc.)

You can prepare to negotiate with a foreign counterpart by reading about the culture. This preparation is important and should be considered to be part of the planning and preparation stage of the negotiation process. But, a negotiator must be cautious not to become too confident about his/her knowledge of a counterpart's culture. Businesses will often employ an agent who is indigenous to the culture with whom negotiations are being conducted. The agent is someone who speaks the native language of the counterpart, is familiar with the custom, culture, politics, economics, current events, and social practices of the culture. Such an agent is indeed someone who is a native of the country and the culture with whom you are negotiating.

Government negotiators usually rely on the services of their embassy or consular personnel who are based in the foreign country where negotiations are to be held. (4) (Negotiating Across Cultures)

For purposes of this manual, the section on cross-cultural dynamics in negotiations is by no means exhaustive. It is important to note, however, the critical importance of taking into account the cultural dynamics that will inevitably influence the negotiation process.

B. Interest Identification of All Stakeholders

At the very heart of interest-based negotiations, is the ability of negotiators to understand and discover the full range of their own interests and those of all counterparts and other stakeholders.

What are interests? Interests are at the vary core of what drives parties in a negotiation. Interests underlie positions. Interests are the commercial interests, policy objectives, bureaucratic imperatives, or legal requirements that a negotiator must satisfy in a negotiation in order to obtain the approval of the home constituencies. Interests need to be distinguished from the negotiating position, which is what a negotiator is instructed to ask for at any particular phase of the negotiation. The negotiating position is dictated not only by the organization's interests, but by the negotiating strategies and tactics of the parties. The negotiating positions of the two parties define the parameters for the negotiations at any point in time. In other words, the positions that parties take in negotiations are based on underlying interests.

By better understanding your own party's interests as well as those of your counterparts, you will be better able to fashion proposals and agreements that can lead to a successful negotiation outcome.

When parties adhere to a single solution as the only solution that will result in a successful negotiation, they invariably limit the broader range of possibilities that might also satisfy their core interests.

Inexperienced negotiators talk about "finding common interests" to successfully solve a problem. While most negotiations are predicated on some recognition of broad shared interests (peace, trade relations, economic gain, etc.), many negotiations are successfully completed only when the negotiators' divergent or different interest are identified. It is the ability to identify these divergent interests or varying priorities that can provide the basis for generating workable solutions between and among parties.

In the planning stages as well as at the negotiating table, the skilled negotiator will employ questions and active listening to learn what is really important to the counterpart----what are their real interests. By successfully identifying a party's key interests (multiple), more options can be generated that will satisfy some, if not all, of the counterpart's interests.

At the end of the day, all parties to a negotiation seek to satisfy their interests. If you can help a counterpart negotiator to satisfy some of the interests of the organization he/she represents, while protecting and advancing your own interests, you maximize the probability of a positive negotiated outcome. A "win-win" solution.

In international negotiations, *interests* may revolve around issues *of economic interests, domestic policy objectives such as , environmental integrity and, resource protection, national security, domestic political considerations, bureaucratic interests, national legal requirements, issues of legitimacy (recognition),and moral or ethical standards* .

Examples: It is difficult to discuss interests in negotiations in the abstract. The following examples help to illustrate the identification of simple interests and trade-related interests.

1. A common example utilized to illustrate interests involves a fight between two children over a single orange. Both children want the orange. Neither child wants one half of the orange. There is no apparent solution to this *stalemate* (standoff or impasse). The solution is revealed when an adult determines the underlying interests of the two children. One child wants the orange to eat the sections while the other child wants the orange peels (skins) to squirt the residue into a candle flame. By identifying the children's *different interests* a solution is easily found: one child gets the orange peel, the other gets the inner sections.

2. In a trade dispute over tariffs on grape imports from country A to country B, the interests of the importing country may be to protect existing markets and manufacturers while the exporting country seeks to maximize sales and profits. Country B seeks to block grape imports and proposes to raise tariffs while Country A seeks to expand its grape exports and remove tariffs barriers. The parties take divergent and competing positions. By discovering that Country A has an interest in exporting grapes during non harvest periods in Country B, while Country B is particularly worried about grape imports during the harvest season, then a negotiated agreement becomes possible.

How does a negotiator identify a party's interests? There are several tools that a negotiator can use in the planning process and at the negotiating table to determine a party's interests.

The use of an *'interest-identification chart"* is an indispensable tool for the development of effective negotiation strategies. A chart is created with vertical columns reflecting the following headings:

PEOPLE INTERESTS OPTIONS BATNA OBJECTIVE CRITERIA

The columns are then filled-in with the names of the parties and interest groups who will be at the negotiating table or who may influence positions taken at the negotiating table.

For each party listed on the chart, generate a preliminary list of the interests you consider to be compelling to each party. Be expansive in your charting, and list as many similar and different interests as you can think of for each party. PUT YOURSELF IN THE SHOES OF YOUR COUNTERPART. In other words, role play within your team as part of the planning process. Designate some of your team members to role play as if they represent your counterpart in the upcoming negotiation.

Ask your own team members/superiors to articulate what is most important to them in the upcoming negotiations. What do they seek to achieve and WHY?

Ask your role-playing counterpart directly, "What are your interests? What do you care about most in these negotiations. What do you want to protect, advance, or gain from the process?

Fill-in the columns in the chart for each party, or constituent group, by asking what are their key interests?

You will also *use the actual negotiation process to learn from your counterparts what their real interests are or how they prioritize their many interests.* As your understanding of their interests expands in the course of the negotiations, you should continuously update the chart. What may be a number one interest to your team or group, may be of secondary or minimal importance to your counterpart. By identifying the different weight or importance of various interests, the parties will be able to promote *trade-offs* or exchanges that will lead to their mutual satisfaction.

Practice tip: Another tool to help identify interests is to pose a series of questions on a piece of paper and then rate how the counterpart might gain or lose based on his/her current perception of choices. Development of a *currently perceived choices (CPC)* chart can be a powerful tool in understanding how various negotiation choices appear to a counterpart. Such a chart can help to uncover and identify the party's real interests. (5)

While interest identification may sound elementary, party interests are often not revealed or obvious because of the power of articulated negotiating positions to obstruct or eclipse the parties from understanding and ranking core interests.

One of the most important skills to develop in the practice of international trade negotiations, is the ability to learn from your counterpart by listening, by asking focused questions, and learning to read "between the lines". (study the body language, emotion, and sense of importance or urgency that a party places on various negotiating issues or agenda items to discover underlying interests.)

In trade negotiations, it can be safely assumed that all parties at the table seek to advance their economic interests. But there may be a multitude of other important interests that compel the parties to take the positions they do. Some of these interests in trade negotiations may include:

a) Protection of sanitary and phytosanitary interests
b) Protection of domestic standards
c) Protection of domestic labor force
d) Protection of environment
e) Protection of political power and legitimacy of those engaged in the negotiations
e) Protection of intellectual property rights or interests
f) Protection of public health
g) Compliance with international law or trade rules over specified period of time
h)
i) Application of same rules to other competitors
j) Gaining positive media coverage or public relations advantage
k) Protection of political power
l) Protecting National Sovereignty
m) Generating perception of fairness, equal treatment, shared burdens

This list is demonstrative and not exhaustive. It is intended to illustrate the multitude of interests that may influence the positions and attitudes of negotiators in a single trade negotiation. The ranking and prioritization of interests will differ between parties. It is in the recognition of these different priorities in the interest that the skilled negotiator can offer creative options (solutions) that maximize prospects for a negotiated agreement.

Framing the Issues

The interests of stakeholders is determined by the impact of the targeted policy measure on the commercial interests of competing enterprises and workers, the policy objectives served by the targeted policy measure, the broader economic impact of the measure, and institutional and bureaucratic interests. It is also shaped by the domestic and international legal provisions that apply to the measure.

A stakeholder's perceived interests may or may not coincide with that stakeholder's real interests, depending on the availability and accuracy of their information. A successful commercial diplomat therefore analyzes the issues not only to better understand the issues at stake, but also potentially to educate other stakeholders on their real interests, where that reinforces the analyst's own objectives..

A complete understanding of the issues, and of the perceived and real interests of stakeholders forms an essential basis for framing the issue for negotiation. In the course of preparing for negotiations, a commercial diplomat may find it necessary or desirable to redefine the negotiating issue periodically as more information sheds new light on he issue. For example, as you learn more about the policy issue underlying the targeted measure, you may find that your own understanding of the problem was faulty and that the more accurate information calls for a different approach to the problem. Or you may need to redefine the problem to reach out to potential coalition partners whose interests are similar but exactly the same as yours. You may find that a better understanding leads you to recast the issue in terms that provide a closer legal fit.

Once you are comfortable that you have done all the necessary analytical work for framing the issue, you must build public support at home and abroad for the desired policy action. If you represent a private stakeholder group and your task is to align the position of your home government with your group's interests, you want to negotiate with the government with as much support from other stakeholder

groups as possible. This may call not only for a coalition building strategy, but also for a public media strategy and a strategy for obtaining the support of knowledgeable and respected experts in the field. If you represent the government, you want to be sure you have strong public support at home for your negotiating position, as well as active support from stakeholder groups in other countries that have the potential of swaying their own negotiators. This calls for an active strategy to reach out to stakeholders with similar interests in other countries, and a foreign press strategy that will enable you to get your perspective accurately reflected in the foreign press.

What should be clear is that successful negotiations are preceded by a considerable amount of hard work to identify the issues and the interests of the key stakeholders, to develop and implement a strategy that will build broad public support at home and abroad, and to negotiate with domestic stakeholders in hammering out a negotiating position for the home government. Successful negotiations are like an iceberg. What you visibly see is only a fraction of what you don't see.

The international bargaining is not the end of the negotiating process either. Any negotiated agreement has to be sold to the home constituencies and implemented with their support. An agreement that is successfully negotiated at the bargaining table but ultimately fails to gain the support of the home government because it is opposed by key constituencies is a failed agreement. Similarly, an agreement that is successfully negotiated and approved by the home government, is still a flawed agreement if the officials responsible for implementing the agreement fail to implement effectively, either because they don't have the capacity or because they lack commitment to the outcome.

V. Identification of Problems and Opportunities

A. What are the elements of the problem (dispute)?

Negotiations take place when parties identify a problem or opportunity that they believe can be resolved or positively exploited through a negotiated agreement. As part of the planning in preparation for a formal negotiation session, it is crucial to identify the problem or opportunity presented and to thoroughly analyze and understand the history and nature of the problem. (Note: for purposes of this section, reference to a problem or conflict between parties will include opportunities as in business or commercial agreements.)

By understanding the nature of a problem or conflict, a negotiator is better able to anticipate the interests of counterparts and to advance proposals and options that may take into account the history of the problem between the parties.

1. History of the Conflict – What is the history of the conflict between or among parties? In a trade dispute, the history may include past practices, tariffs, quotas, dumping, or other trade-related practices that have defined a trading relationship. What has changed since the original conflict began? Have political parties or representation changed, key players within administrations or effected businesses?

2. Identify multiple elements of the problem and break the problem down-

. By breaking the problem into multiple parts, various solutions can be applied to different aspects of the problem. If part of the problem can be solved, this may build confidence among or between the parties to solve the outstanding issues.

3. Frame the key issues- by breaking the problem into its component parts, a negotiator can prioritize the most important issues and devote appropriate time and resources to solving those aspects of the problem that are essential to a solution of the issue..

Example: A dispute over the importation of genetically modified organisms (GMOs) from the United States to the EU may be more easy to resolve if the larger problem is broken into its component parts:

- Foods for human consumption or animal feed
- Processed foods or fresh foods
- More or less than 5% GMO content
- Subject to labeling or not
- Timetable for importation/implementation (30 days or three years?)
- Products already tested by the Food and Drug Administration in USA or not?

(Practice Tip: *Interview people familiar with the history of the conflict to learn the dynamics and particulars of the dispute.* **)**

B. What is the opportunity to be pursued through negotiations?

As indicated, *supra,* many negotiations are prompted by parties engaged in a conflict or seeking to avoid a conflict. The o*pportunity* to be achieved in a negotiation is often more apparent in a commercial or business transaction where the parties seek to negotiate a mutually beneficial outcome. The opportunity present between a buyer and a seller is usually obvious. The negotiation will pertain to terms and conditions of the sale, specifications, delivery guidelines, and other implementation procedures.

Even in a conflict or trade dispute, the parties must analyze the opportunity presented by a negotiation as compared to the alternative. If the alternative is better, then there is no need to expend time and resources preparing for and participating in the negotiation process. But, if an opportunity can be identified, then an incentive will inspire the parties to engage in the negotiation. In a trade dispute, the opportunity may be to avoid the consequences of a more protracted and costly dispute settlement process under WTO rules, or, to avoid retaliation or penalties that may result from an adverse finding if your party is deemed to have violated established trade rules and requirements.

Other measurements of opportunity at the negotiation table may include:

- Preservation of the trading relationship
- Non-disruption of other trade flows
- Exploration of options that may be less costly than a full blown dispute settlement procedure
- An opportunity to learn of the other party or parties' explanation of conduct or position
- An opportunity to maintain status quo while exploring options at the negotiating table

C. Why is a negotiated resolution preferable to other options?

As will be discussed, *infra*, a crucial element of the negotiation planning process is to determine the BATNA or Best Alternative to a Negotiated Agreement of all parties. This process may be considered to be a "cost-benefit" analysis of negotiations. Some factors to consider in weighing the benefits and costs of negotiations are:

- How much time will be required to pursue a negotiation?
- Will there be travel required?
- What will be personnel costs in terms of research, planning, and preparation
- Will a negotiation process be efficient in terms of time and cost as compared to a non-negotiating alternative?

VI What Are the Negotiating Goals and Objectives?

"You Can't Always Get What You Want, But If You Try Sometimes
You Get What You Need"…..lyrics from a Rolling Stones Song

A. *Can you identify your preferred outcome?*

Closely linked to your analysis of the problem and opportunities presented by a negotiation process is your ability to articulate your negotiating goals and objectives----or your *preferred outcome.*

One method you can utilize in planning and preparing for a negotiations is to clearly articulate your preferred outcome. What is the ideal solution that would satisfy all of your interests? While it is unlikely that you will be able to attain all of your objectives in a negotiation, it is critical to be able to articulate with your team and allies exactly what solution, remedy, or objectives you are pursuing. If you don't have a vision of your preferred outcome, it will be virtually impossible to develop a comprehensive negotiating strategy.

And, just as you seek to break-down the negotiating problem into multiple subsets, you will be far more effective at the negotiating table if you can break-down your preferred outcome into multiple parts. It is easy to identify a broad desire to "win" , or to forestall conduct of a counterpart that you deem to be detrimental to your interests, but articulating different outcomes that would satisfy some or all of your interests will give you greater flexibility at the negotiating table.

B. *Write what you want on paper.*

Can you really describe what you want?

Practice Tip: *Write what you want on paper. Spell out exactly the outcome that would be ideal and do this for as many aspects of the problem that you can identify.*

Does writing what you want on paper mean that you will share that with your counterpart---not necessarily, though in some situations that may prove advantageous . In the "dance" of high stakes negotiations, parties may prefer not to reveal what they consider to be their *"bottom line"* or absolute last compromise that they would be willing to make.

Revealing your bottom line should not be confused with understanding what you are going to pursue in the negotiation. When asked what you want, you should be able to reply with an emphasis on key interests that you seek to satisfy and some options that will still leave you room to bargain or engage in the practice of trade-offs or mutual compromises.

C. *Can you describe your counterparts' negotiating objectives/preferred outcomes?*

Just as it is important to be able to articulate and describe your broad negotiating objectives, it is important to be able to identify your counterparts' negotiating objectives. In a multilateral (multi-party) negotiation, the various parties may share some objectives while maintaining very divergent views or goals on various issues.

As part of the planning process, attempt to write down your counterpart's negotiating objectives. Put yourself in "their shoes". What does the problem look like to them?. What do they want? By understanding what your counterparts' are seeking, you may be better equipped to fashion proposals that will empower the counterparts with their respective superiors and constituencies.

Even in high stakes negotiations, parties will often arrive at the negotiating table without a clear vision of what they want. The ambiguity and lack of focus of a negotiating team can make the work that much harder for all parties. By asking questions of your counterparts you can help to determine what their key interests and objectives may be.

By articulating what you consider to be a counterpart's key interests, you might explore, hypothetically, what you consider to be their key goals in the negotiation. Invite your counterpart to correct your assumptions, if they are mistaken, and use this tactic as an opening to draw out the counterpart's negotiating objectives.

Remember, by learning from your counterpart about their interests and negotiating objectives you are NOT making concessions or agreeing to accommodate. You are simply expanding your understanding, conveying to your counterpart that you respect the importance of the issue to him or her, and establishing an aptitude as a negotiator to collect valuable information and insight before fashioning proposals or modifying proposals that may already be on the table.

Practice Tip: Never underestimate the importance of a particular issue or interest to a counterpart. What may not seem important to you may be very important to your counterpart. If you can incorporate language that addresses a key objective at little cost to yourself, then do it.

Example: In an air route and landing rights negotiations between the United States government and a Latin American country, the Latin American negotiators made it clear that they would need technical assistance to properly train their pilots and air traffic controllers. To the U.S. negotiators this was of little consequence as the U.S. government was committed to providing the technical assistance. The U.S. negotiators were dismissive and sought to reassure the Latin American delegation that they had nothing to worry about and that there was no point in taking up time in the negotiations. As a consequence, the negotiations bogged down on the harder issues of air routes, landing rights, etc. A disgruntled Latin American delegation left the negotiations. Had the U.S. government team spent some time crafting language that affirmed its commitment to technical assistance the Latin American team would have secured important text to take home and to perhaps justify compromises made on other issues.

D. *The Role of Opening Statements in Multiparty Conferences, WTO Working Groups, and Mediation Fora*

In many multilateral settings, including the WTO, parties will form "working groups" or conferences to discuss potential reforms, remedies, or rules to guide negotiations.. Parties to a negotiation normally initiate the process with an *opening statement.* The opening statement provides parties with an opportunity to identify key issues and interests as well as to articulate parameters for potential agreements. Again, this is not a process where a party "reveals a bottom line", but rather an opportunity to stress the importance of the outcome to the interests of the party and to establish early in the proceeding exactly what the party making the opening statement has been directed to pursue by his/her nation or other organizational hierarchy.

After a few negotiating sessions, participants can grow weary of the repetitive enumeration of each side's views and positions on the issue. Nevertheless, a country's position, no matter how often it is repeated, remains one of the anchor points in a negotiation and it is important to be clear about the starting point for each negotiating session. Repetition of the country's position also provides an opportunity to ask whether any aspect of the position has changed since the last session. Miscommunication and false assumptions can easily set a negotiation back, so it is important always to be very clear about the two positions that frame the negotiation. Patience is a key characteristic of a good negotiator, and a certain amount of repetition is the price you pay for being a negotiator.

Practice Tip: *Use your opening statement to clearly identify your key interests, to acknowledge your counterparts, and to employ some dramatic effect to underscore those key objectives that you may deem to be essential to your agreement. You put all parties on notice, you establish yourself as prepared and resolute, and can also indicate areas where you think creative options or compromise might be appropriate.*

Be attentive to your counterparts as they make their opening statements. You convey respect without offering compromise and you learn what is of utmost importance to your counterparts. There may be a use of terminology, phrasing, or nuance that you can incorporate in a proposal or later intervention that will resonate clearly with the other party.

VII Expanding Prospects For A Negotiated Solution

A. Create Multiple Solutions to Satisfy Interests

One of the key elements to effective negotiations is the development of multiple options or solutions to satisfy party interests. In addition to active listening, the best negotiators distinguish themselves by their ability to create and generate multiple options in both the planning stage and at the negotiating table. This is the area of interest-based negotiation practice where a negotiator's creativity and capacity to think beyond a single solution is paramount. The shortcoming of many positional negotiators is that they become fixated on single solutions or positions that blind them to other possibilities. Such singular thinking can lead to stalemate and impasse in the negotiation process.

How do good negotiators generate multiple options? The following list provides some useful suggestions on how to generate options in both the planning and negotiation process:

1. Use of research and advance planning to develop multiple Options (solutions) to satisfy multiple/diverse interests

   In the planning stages, negotiators develop their negotiating strategy. The first steps of problem identification, articulation of a preferred outcome, and identification of stakeholders and their interests have been discussed. Using an interest identification chart (see exhibit_), the column labeled "options" can be used to incorporate various solutions to satisfy each of the identified interests for ALL parties. Remember that parties all bring multiple interests to the table.

   The question to ask is "How can we satisfy this interest?" In the planning and strategy development stages, a negotiator can craft extensive lists of options that can later be prioritized, refined, and/or eliminated. The advantage of developing such a list

before the negotiation session, is that the negotiator can then bring a refined list to the table to guide him/her in the heat and emotion of the negotiation session.

2. Team-building and brainstorming-

Organize a *brainstorming session* where team mates all join in generating options to that may satisfy the parties' interests. Such a team building exercise can help assure that all participants in the negotiation become fully engaged in searching out solutions. In this exercise, begin with work on your own interests and generate different options that will satisfy your identified interests.

Practice Tip: *An organized brainstorming session should include use of flip charts, white boards, or butcher paper (sheets of white poster paper). Designate one team member to act as scribe—to list the options as they are suggested. Proposed options should NOT be judged or evaluated during the preliminary brainstorming session. Allow the ideas to flow freely. Create an atmosphere that welcomes any and all ideas no matter how extreme or unrealistic. During a second session, go through the list and invite constructive criticism and prioritize the best options by ranking them numerically.*

Even an apparently wild or unorthodox proposal may trigger a more realistic modification that will have utility and may be applied in the formal negotiation session.

3. How to explore possible options with team mates and counterparts…"What if…..

In working with team mates or counterparts, there are some useful techniques that can be employed to elicit reactions, ideas, and counter-proposals. An error commonly made is for parties to advance a proposal as an ultimatum or as a non-negotiable, singular solution. By inviting a team mate or counterpart to evaluate a proposed option, the negotiator gives the counterpart the *power of choice*. They have the power to accept or reject the proposal. However, when a negotiating partner summarily rejects a proposal, ask them to offer a counterproposal, to offer a modification of your proposed option that would make it acceptable to them. You are, of course, not obligated to accept the counterproposal but you have engaged the counterpart in helping to define a solutoin.

By employing this tactic, you do not cede power to the adversary over the negotiating outcome. You do engage them constructively in the formulation of options for consideration, comment, and acceptance or refinement.

A useful technique for eliciting a team mate or counterpart's input is to ask, "What if we did x, or what if we agreed to do y?" By posing the option in the form of a question, the counterpart's opinion is sought and their counter-proposal or modification may build upon your affirmative option or proposal—one that reflects your planning and vetting among team

mates. A minor modification that preserves the essence of your proposed option may work to gain the acceptance of a counterpart.

4. Listen to and record all proposed options, pursue information of supporting rationale (how did they arrive at this option/proposal?)

In both brainstorming sessions with teammates and with counterparts, it is important to record all proposed options. The use of charts or posted paper is an effective means as it will preserve the proposal for ongoing review and comment and create a record of the session.

Without agreeing or acquiescing to a proposed option that has been generated by a teammate or counterpart, you can gain valuable information and expose potential weaknesses by asking the contributor, "How did you arrive at that solution or proposal? What is it based upon? Is there a factual, scientific, or other objective basis for your proposed option?"

If the presenter can offer further evidence or criteria in support of their proposal (or if you can in response to a similar question) the information shared may be useful in winning support from constituents or superiors who may be skeptical. The further information or lack thereof can fortify or reduce the value of a proposed option.

B. Identify Your BATNA (Best Alternative to a Negotiated Agreement) and your counterpart's BATNA

Among the many (multiple) options that may satisfy a party's interest are the options that may be found AWAY from the table. The authors Fisher, Ury, and Patton coined this acronym in Getting to Yes (7). The acronym appears in the interest-based planning chart in the column immediately following the list of options. This is intentional as a party's BATNA is also an option. But it is an option that is exercised *outside* of the negotiation. It represents an alternative to pursuing a negotiated outcome.

As part of the negotiation planning and strategy development process, a party must compare the potential advantages of a negotiated solution to those alternatives available to the negotiator without negotiating.

Example: If an employee seeks to negotiate a raise with her boss, she can employ whatever arguments and reasoning she thinks should entitle her to the raise. The employer has the option to grant or deny the raise. The employee will have more leverage in the negotiation with her present boss if she introduces her BATNA, another job offer. This increases her negotiating leverage because if she does not get the raise she can pursue the other job. If the alternative job offer is good enough, she can forego the negotiation with her current boss all together and simply accept the new job offer.

As part of the planning process, identify what options are available to your team away from the table. The BATNA is NOT static. You can work to improve the strength of your BATNA by actively working to strengthen the availability and desirability of a walk away alternative.

Similarly, it is essential to anticipate and chart the BATNAs that may be available to your counterparts. How can you keep them at the table if they have a strong BATNA? You can keep a counterpart engaged in the negotiation process by introducing information (evidence or objective criteria) that will make their BATNA look less secure, uncertain, or less attractive than what might be negotiated at the table.

Some examples of BATNAs present in trade, commercial, political, environmental, and labor disputes follow:

BEST ALTERNATIVE TO A NEGOTIATED AGREEMENT

(BATNA)

(Remember, these are examples only and do NOT represent an exhaustive or automatic BATNA…Every negotiation is different. The BATNA's listed may be exercised by one or more parties to a dispute.)

a. Trade Dispute – **Dispute Settlement Body of the WTO-**
Instead of negotiation, the party takes their case directly to a WTO Dispute Panel as either the complainant or respondent.
Pursue Other Markets
Abandon trade relations with recalcitrant nation and pursue other global markets.
Status quo-
Accept the status quo. Learn to adjust to conditions imposed by trading partner.

b. Commercial Dispute - **Pursue other markets-** see above
Litigation (Arbitration)-take complaint to judicial forum or arbitration…Let a third party resolve the dispute.
Status quo

c. Political Dispute - **Support another regime**
Introduce legislation to solve problem

	Pursue complaint with international body
	Go to war
	Status quo
d. Environmental Dispute	**Find other resources**
	Introduce legislation to protect resources
	Go to court or international tribunal
	Status quo
e. Labor Dispute	**Find another employer**
	Find other workers
	Submit to arbitration
	Pursue litigation
	Go on Strike/withhold labor
	Status quo

All of the suggested possible BATNAs include the option of the *status quo* or acceptance of the current situation. On balance, the exercise of this "walk away" alternative would be the result of an analysis that the current situation is acceptable, or preferable to the time, resources, and likelihood of securing a better outcome through negotiations.

The other possible BATNAs represent a range of options---all of which are found AWAY from the negotiating table.

Practice Tip: *Do not confuse a BATNA with an option that must be secured through the negotiation process. By definition, a BATNA is not an outcome that is achieved in the negotiation, it is an option that is pursued in lieu of negotiations or if negotiations fail to produce an outcome that is as attractive as the BATNA.*

Remember to chart as many BATNAs as you are able to generate for your party and for all other parties engaged in the negotiation process. Understanding your counterparts' BATNAs is of critical importance. Your job at the negotiating table is to display an understanding of the other parties' BATNAs and to show them why those BATNAs are NOT as attractive as they may present them to be.

If you know your counterpart's BATNA, you can introduce information (facts, evidence, objective criteria) to undercut the attractiveness of their BATNA. This serves to keep the counterpart engaged at the negotiating table and gives you more leverage to pursue a negotiated outcome.

G. Use of Objective Criteria

The final element in the interest-based negotiation chart, is the category of *objective criteria.* Objective criteria represent a set of independent or external standards that are introduced to support the legitimacy or fairness of a party's proposed option or solution.

Objective criteria can be viewed as factual information drawn from any number of sources. The introduction of objective criteria at the negotiating table is a form of submitting evidence in support of your argument or proposal. The goal is to persuade the other parties that your proposal is reasonable and consistent with findings of independent, neutral experts.

For example, in a dispute over the value of manufactured steel that is the subject of an anti-dumping complaint, some of the objective criteria that would be essential to the prosecution and defense of the claim would be production cost, grade of steel, market value, and other costs. Some of this information will be within the province of the parties to the dispute. Some of the information will be generated exclusively by scientists, academics, or other experts familiar with the industry and industry practices.

Objective criteria can also be understood as the introduction of *fair standards*. By relying on a non-party to the negotiations who in the normal course of business produces scientific or market studies, the parties can agree on the standards or norms that will serve as guideposts in the negotiation process.

A party may be skeptical of your representation that a certain proposal is fair. If you can offer outside criteria in support of your proposal, it will convey legitimacy to persuade both your counterpart and their constituency or superiors.

Some examples of sources for objective criteria include:

- Market values
- Prevailing wage rates
- Industry standards and practices
- Expert studies
- Academic research and reports
- Rules and regulations
- Precedent decisions (decisions made by legal or authoritative bodies on similar types of issues or cases.
  - WTO Dispute Settlement Body decisions (while not binding, may be instructive as to how the WTO DSB would decide a similar case.)
  - Court decisions
  - Arbitrator decisions and awards

These elements, present in every negotiation, represent the fundamental aspects to be considered in the development of negotiation strategy and at the negotiating table. Use of the interest-based negotiation chart is an essential planning tool and road map that can be used throughout the negotiation process.

To review, the core elements present in the negotiation process are PEOPLE (Stakeholders), INTERESTS, OPTIONS (solutions), BATNAs, and OBJECTIVE CRITERIA.

VIII Research, Planning, And Pre-Negotiation Negotiations.

A. Pre-Negotiation Preparation and Planning

Every negotiation includes four phases.

- Research
- Planning
- Dialogue
- Implementation

1. Research – "Information is Power"

The research that you conduct prior to a formal negotiation session and even prior to your strategy development and planning is absolutely crucial to building your negotiating power.

a. Where to look for information.

- Look Within Your Organization- A good starting point in your quest for useful information is within your organization. Even if you are approaching a new problem or situation, there may be valuable information about the history of a counterpart, anecdotal information about various negotiators and their styles, habits, preferences, and records or archives about a particular trade or economic issue.
- Develop a list for researchers within your organization or in other departments. Particularly with governmental organizations, you may have access to other departments, research divisions, intelligence services, economists, or others who can be helpful in the assembly of country profiles, economic trends, historical information, and current analysis of issues related to the negotiation.
- Use the Internet to conduct searches. Input country, region, names of negotiators, products, economic studies, and subject fields pertinent to your negotiation. Be expansive at first, you can always narrow your search.
- News and media outlets. You can often program a website of news and media outlets (cnn.com, nytimes.com, etc) to highlight or identify coverage of key regions, countries, or issues. REMEMBER, to monitor news and current events DURING the negotiations. A change in stock values, natural disaster, political change, or other factors may influence the negotiators in your negotiation. Be vigilant of current events and review with your team mates.

- Build a ROLODEX or data base of contacts. As you develop your professional career as an organizational representative/negotiator, build your own data base of contacts in different fields of expertise. A phone call to one of these contacts as you prepare for a negotiation may provide leads to others in the field who can be of assistance. Be mindful of collecting business cards from people you meet socially, on airplanes, etc. who may be helpful to you in the future.

b. How to assemble the information.

During your research you may want to create separate files (folders or data based files on the computer) where you can group information sorted by party (stakeholder), issue, interests, options, BATNAs, objective criteria, etc… This information can then be distributed in your CHART. You can also assemble hard copy files of pertinent reports, news clips, prior agreements, or other information that you may want to refer to during the negotiation or copy for distribution to counterparts.

2. Make Charts

As indicated, supra, MAKE CHARTS. See Exhibit _____ Use of the chart is time-saving and will help you to organize your information, facts, and planning. Making the chart at the beginning of the research and planning process is essential. Assembly of a chart at the end of the process is of little utility.

3. Team building, and learning to speak with one voice.

As indicated, the research and planning stage is also when you will organize your negotiating team. Depending on your interest group, this may be an entourage of different agency representatives, department representatives, or subject matter experts.

a. Organize Your Team. Early in the team building stage you should outline team member roles and assignments. ALL team members can and should help in the assembly of information. Based on team members' areas of expertise, you can develop a list of information sought and assign different team members their assignments. Be sure to assign deadlines for the return of information and meet regularly to monitor progress and compliance.

b. Organize Brainstorming sessions. An organized brain storming session can serve a number of functions. First, it gets your team members comfortable working with each other and empowers all team members to be contributors to the process. Set aside a designated time and place to do nothing but brainstorm interests and options for your own team AND for all other stakeholders. Chart this information on flip charts for all to see. Invite participation in the brainstorming and use the techniques already described on prioritization and list creation.

c. Practice Role reversal. Use this part of the planning stage to have members of your own team play the role of counterparts. Insist that they assume the role by speaking in the first person. Ask them directly what are their concerns, goals & objectives, interests….What would work for them and why?
d. Designate team leader(s) – SPEAK WITH ONE VOICE—During this planning phase, it will be important to make clear who is the head of delegation (this may already be clear from the organizational culture and ranking system). If it is not clear, make it clear. There is nothing more debilitating to a negotiating team that to present ambiguity in team leadership and roles. Resolve any power struggles BEFORE you head to the negotiating table.

B. Logistics Related to the Negotiations

As part of the planning stage, you need to attend to the logistical and practical aspects of the negotiation process. This is different from the research and development of negotiating goals and strategies. This is the nuts and bolts of scheduling, locations, facilities, etc.

1. Place and Time of the Negotiation. When and where will the negotiations take place. Who is hosting the session? Check on the following:

a. Facilities and Location
- Set-up of conference room: seating, windows, air conditioning, etc.
- Break-out rooms for private meetings (caucuses)
- Phones, faxes, computers, communications
- Security if necessary
- White boards, flip charts, projectors, computer hook-ups, etc.

b. Time….Travel and acclimation…
- Schedule negotiation meetings with sufficient time to acclimate to a new time zone or environment
- Make clear to counterparts when you will have to leave if other commitments require…(Note. It is sometimes desirable to rely on counterparts' timetable…with yours more open-ended… Utilize the pressure on them to conclude negotiations.)

2. Pre-negotiation negotiations

Negotiations may actually begin BEFORE you arrive at the negotiating table. Be mindful that phone calls, email messages and other communications can and will be used to discuss and exchange the following:

- Information on meeting logistics (when and where, who participates)
- Exchange of background information (Request relevant documents so you can review BEFORE the negotiation session and offer to provide documents that you think will be useful to counterparts.

- Agenda Setting---you can suggest specific agenda items and an order for proceeding before you arrive at the table. Your counterpart may submit agenda items or preferred order of agenda. Take time to review before responding.
- Rules of the negotiation
  - Discuss confidentiality
  - Discuss media contacts
  - Use of tape recorders, video cameras, stenographers
  - Use of interpreters

Use the pre-negotiation period to learn as much as you can about counter part expectations. Avoid being caught by surprise by requesting information and expectations before the formal sessions are convened.

VIII Skills To Employ At The Negotiating Table

To this point the emphasis has been on pre-negotiation research, analysis, and planning. The work completed before a negotiation session will empower you at the negotiating table. But, once you are actually at the table, you need to apply certain skills and techniques that will protect your interests and increase the probability of a successful negotiation.

Remember, there is no guarantee that a given negotiation will result in a satisfactory agreement. You can increase the probability of a positive outcome through your preparation and by developing your negotiating style and skills at the table.

A. The preliminary steps of the dance.

Before launching into the negotiation proper—the substantive issues that have brought the parties to the table—you will want to go through a basic check list to insure that everything is set to facilitate a production session.

1. Review the conference room or other meeting facility to make sure it is adequate and conducive to productive work. (It is a good idea to review the site of the negotiation the day prior to the negotiation session to make sure all is in order and to visualize the location where you will be, assuming you are negotiating in a new location.)
   - Review lighting, table, and chairs
   - Review window location, air conditioning, noise
   - Access to private meeting rooms or offices
   - Availability of phones, faxes, etc.

   If there are any problems, contact your host or counterparts and request the changes that will be necessary before the session begins.

2. Introductions—introduce yourself and your team members first. Remember you are dealing with people. Work to build an early rapport with the counterparts even though there may be serious and contentious issues which divide your governments, companies, or NGOs…
3. Acknowledge the work of the host party in making arrangements for the negotiations
4. Inform your counterparts of any special needs, recess or adjournment requirements.
5. Listen to your counterparts as they make introductions
6. Make a seating chart that indicates where the counterparts are seated by name and title if appropriate

B. Review Procedural Issues

1. Affirm confidentiality/media agreements
2. Review protocol or rules agreed to regarding the negotiation
3. If appropriate, identify applicable law, rules, or regulations

C. Opening Statements (see supra.)

As discussed, an opening statement is an important "first intervention" in a formal negotiation, working group, or conference setting. Use it to establish your authority, interests, and commitment to the process.

1. Acknowledge the convenors, hosts, and counterparts
2. Introduce yourself and your team mates, even if you are already acquainted with people present
3. Identify your broad aspirations for the negotiations. (This may be a first instance to suggest an alternative to the negotiations that you would prefer not to pursue, but you let the parties know it is an available option. E.g., filing a complaint with the WTO)
4. Identify your party's key interests and articulate the most important issues presented by the negotiation
5. Set parameters if necessary. Indicate what is beyond your authority or interest to negotiation.
6. Acknowledge your counterparts' interests as you understand them
7. Use this opening to "vent"—to demonstrate how another party's conduct has hurt or damaged your party or interests.

D. Active Listening

Combined with inventing multiple options, active listening is one of the most important skills to be developed as a negotiator. It sounds like common sense, but many negotiators do not make good listeners. The most confident negotiators, however, use the art of active listening to enhance their understanding of their counterparts' interests.

1. Active listening is more than just listening. Active listening is the act of communicating to your counterparts that you have heard what they said. This act of communicating understanding does NOT mean that you are accepting or acquiescing to your counterparts' proposal.
2. Repeat and reframe what you have heard. By actively restating what the speaker has said, you communicate that you have indeed heard what

Example: "If I understand you correctly, you are saying……" (then repeat what you have heard them say) "No, that's not what I said…" "Oh, please, correct me.. I want to make sure I understand your position-proposal-etc."

E. Ask Questions – Information is Power

Combined with the skill of active listening is the skill of asking questions of your teammates and of your counterparts. Again, this may sound like a basic tenet of negotiations at any level, but many inexperienced negotiators use every opportunity to advance their proposals, their options, and their ultimatums at the table. By failing to use the negotiation setting as an opportunity to learn, a negotiator will remain uneducated about counterpart interests.

Remember that asking for information or clarification does NOT indicate or convey acceptance of a proposal. To the contrary, it conveys interest and a willingness to understand a party's interests.

1. Use questions to draw information from counterparts---Information that has not been offered or volunteered by a counterpart in an opening or affirmative statement may be shared or revealed in response to a question.
2. Use questions and responses to *build your information base.* The broader and more complete your base of information, the better-equipped you will be to fashion proposals, options, and solutions that can result in a successful outcome.
3. Examples of intentional "*leading questions"*. Leading questions are those designed to get your counterpart talking/sharing information:

    a. "How did you arrive at that position?"
    b. "What is your proposal based upon? If we understand the basis of the proposal we will be better equipped to share it with our superiors, home office, etc."
    c. "What information did you rely upon to reach that conclusion? Would you share a copy with us?"
    d. "Please explain further…"
    e. The use of the single word "*Why"* can be a trigger to uncover underlying party interests…..

Remember also that patience in the negotiating process can give you the upper hand in terms of command of information, finding out what is really important to your counterparts, and determining areas where trade-offs or compromise might be appropriate.

F. Use of Silence

One of the more powerful skills to be employed in the negotiation process is the tactical and timely use of *silence.* In many cultures, protracted silence creates a socially uncomfortable atmosphere. People will offer words and verbiage to fill the silence. If your team speaks with a single voice and your team members respect that there is only one speaker representing the party at the negotiation, then your choice to employ silence should be honored by your team mates. You will be interested to see how

counterparts may offer further information, concessions, or compromises simply because you have held your tongue and waited for further comments from your counterpart.

G. ***Introduce a Written or Single Text Document***

The "dance" of negotiation can involve protracted dialogue and discussion that may seem unproductive as parties restate positions and appear to offer nothing to advance the process. In most productive negotiation sessions, the parties will eventually reduce areas of agreement or consensus to writing. Once parties begin working on text there is often a qualitative change in the course of the negotiations. Parties begin working together to craft appropriate and acceptable text.

You can actually expedite this productive stage of negotiations by introducing a *written or single text* document. By offering text that describes a prior agreement or suggests a potential resolution, the parties will begin discussing terms in response to the written text you have introduce.

There are many advantages to this technique. First, you are able to craft language that is acceptable to you and your team members. You can review drafts and amend on your own time before presenting to your counterparts. When a draft proposal or agreement is presented to counterparts, it should be with the intent of *inviting their feedback.* In other words, you are not presenting a text that is non-negotiable, you are facilitating the process by getting something in writing that the parties can react to. There may be proposed changes that are minor and which make the document read better. These are obviously welcome changes and give your counterparts a hand in the crafting of the document. They see *their* words in the document and are more likely to support and sign an agreement that has their input and "fingerprint".

Some proposed changes may be fundamental and go to the very substance of the negotiations. Even if the proposed change is unacceptable to your party interests, you can use the objection or proposed change to explore other variants and options that may satisfy all parties.

Don't be lazy and let the other parties offer all written text. Be proactive. By taking even 5-10 minutes prior to a session, at a break, or during a recess, you can return to the table with a single text document (usually relating to a single issue being negotiated) that may indeed serve to focus all parties attention in a manner that is constructive and consistent with your interests.

Examples of single text or written documents cover a wide range, including:

- Proposed agenda
- Proposed procedural rules related to confidentiality, security, timetable of negotiations, location, etc
- Proposed substantive elements of an interim or final agreement
- Proposed text on consequences of a breach of an agreement

- Proposed text on alternative dispute resolution mechanisms
- Proposed text on implementation guidelines, deadlines, etc.
- Proposed text incorporated from other documents, prior agreements, applicable rules, guiding principles, etc.

To be effective, a written or single text proposal need not be long or address a long list of issues.

Use text that has been agreed to as building blocks that can be linked to constitute an interim or final agreement between or among parties.

Obtain signatures or initials of the parties on individual text documents and proposals to indicate support. This can be done with the assurance that no final agreement will be signed if not acceptable to the party, but the act of signing or initialing the interim agreements or building blocks is to establish a "culture of agreement" and signing documents together.

H. Take Breaks from the Negotiating Table –"Go to the Balcony"

1. Get AWAY from the table. This can be one of the most important and underutilized tools to increase your negotiating power. (6) (Getting Past No.) Negotiators, even when representing a large organizations, often make commitments or concessions without having discussed fully with team mates or superiors. If you exceed your negotiating authority you can anger superiors and depending on the severity of the breach of confidence and authority, you might even lose your job!

"Going to the balcony" is a terminology intended to mean the physical act of absenting yourself from a room by going out on the balcony, or going to a balcony where you might still observe the proceedings but from a more distant perspective. Taking a break allows parties to achieve a number of important negotiating objectives, including:

a. To review an oral or written proposal…. "You have obviously put a lot of time into developing this proposal, let us take a few minutes to review it….." Or, depending on the weight and volume of what has been introduced by a counterpart, you may need a week or a month recess for your economists, scientists, or other experts to review the proposal and the underlying data upon which it has been based.

b. To develop or formulate a response. Thinking "on your feet" or in the heat of the moment may lead to unwise decisions and incomplete formulation of a counterproposal or response. Take a break, leave the room, and work on the formulation of a response or counter-proposal that protects and advances your party's interests.

c. To regain your composure. If you feel that a counterpart or counterparts are moving to quickly, using intimidating tactics, or if you simply don't feel right about the pace of the negotiations, then it is your absolute right and prerogative to request a recess or short break. Use a break to regain your composure, talk with your team mates, and to evaluate what has transpired to make you feel uncomfortable or uneasy.

d. To allow for a counterpart to calm down or review a proposal you have made. Yes, you can take a break to facilitate your counterpart's need for an opportunity to hear from his/her team mates who might be supportive of a proposal you have made and will lend their voice to move a recalcitrant lead negotiator.

2. How do you get away from the table? You simply ask to take a break.
"We would like to take a short break to review your proposal…"
"We would like to take a short recess…."
"Perhaps it would be helpful if we take a break and allow all parties a chance to review and discuss the most recent proposal, "

A mediator may ask that parties to wait until a party has completed a presentation or answered a question on the floor before agreeing to a recess. You, too, might ask another party to postpone taking a break until you have completed a proposal or explanation.

I. Identify dirty tricks and ultimatums

Most serious negotiators representing national trade ministries, multinational businesses and international NGOs bring a level of sophistication and professionalism to the negotiating table, but there are always circumstances where a desperate or aggressive negotiator will employ dirty tricks, ultimatums, or intimidation.

The key to dealing with unprincipled negotiators is to *recognize and identify* the tactics being used. By being mindful of the types of tactics that are sometimes used, you can evaluate the impact that such tactics are having on the negotiation process and utilize one of the following techniques:

1. Identify and focus on the tactic. Explain to the counterpart that you do not appreciate intimidation, abusive language, or ultimatums. You can also convey that you remain fully prepared to continue in a good faith negotiation but will not accept conduct that is disrespectful or designed to intimidate. In many instances, identification of the perceived tactic will result in a denial by the counterpart, but often you will realize a change in behavior as well. By clearly articulating what you perceive to be unacceptable behavior changes the atmosphere of the negotiation and registers that you will not succumb to such tactics.

2. Utilize counter-tactics to counteract the behavior. In the face of an ultimatum (a "take-it-or leave-it" offer), you can request a break to review the offer. Return to the table to draw the party back into the negotiation by asking them how they arrived at that final offer. Use questions to draw the counterpart back into the game of a give and take negotiation.

3. Make contact with the counterpart's superior. In the most egregious case of disrespectful, demeaning, or insulting attacks by a counterpart, indicate that you will not participate in a negotiation where such behavior is manifest. A party can refuse to continue in a negotiation where such tactics are employed and contact the offending official's superiors to request that the offending personality be replaced at the negotiating table before you will continue in the process.

4. Demand respect for your team. By treating counterparts with a modicum of respect you can appropriately demand that respect be reciprocated.

Often, the tactics described above reflect the conduct of a highly emotional, defensive, and inexperienced negotiator. While such tactics may have worked in some instances, you need to make it clear that such conduct is unacceptable in the present negotiation.

J. Build Your Reputation

At the end of the day, a negotiator will be evaluated as fair or untrustworthy. If you gain a reputation as being unfair or unprincipled, this reputation will follow you and will be difficult to overcome. There is a difference between appearing tough but principled, and being unscrupulous and unprincipled. You build your reputation as a negotiator in large measure by your ability to follow-through and implement commitments made during negotiations.

While your negotiating assignments will change, it is in your interest to monitor the implementation of agreements that you have negotiated. If your party is unable to fulfill a commitment due to a change in circumstances that were unforeseeable at the time of the agreement, you can initiate contact with your counterparts to discuss how commitments might be honored even if they require post-agreement modification or adaptation.

As discussed earlier, building rapport and a good working relationship with your counterparts will inure to your long term benefit. Remember, that you are dealing with people who have their own professional aspirations, honor, and pride. Often, the key ingredient in building a strong working relationship is to build a friendship away from the negotiating table. Sharing meals, gifts, and providing hospitality to negotiating partners who have journeyed to your city will translate into more productive work at

the negotiating table. Your ability to reach out to the people at the table, regardless of the severity of conflict between principals, demonstrates a maturity and confidence that will win respect and help the parties to navigate the difficult terrain of the negotiation.

IX Drafting Durable Agreements

A. The following outline provides the key elements that should be contained in an enforceable agreement (contract). A final agreement between parties may take on the status of a treaty agreement (between nations) or an enforceable contract (between businesses or NGOs). Important issues in international agreements include the choice of law that will determine what courts or arbitration systems will enforce an agreement if one party breaches (violates) its obligations.

B. Elements of a written agreement or contract

1. Title – include suggestion of achievement in title (e.g., "Trade Agreement Between Chile and Brazil"; "Agreement on Reconciliation of Multilateral Environmental Agreements (MEAs) and Trade Agreements Between the United States and the European Union.")
2. Preamble- One or several paragraphs "media statement" – describes the achievement in layman's terms-designed to make it easy for media and public to understand significance and key elements of agreement.
3. Identification of parties and their authority-include names of parties (Identify governments, businesses, and NGOs and the individual people representing them. Include titles and authority of the negotiators.)
4. Number paragraphs (articles) (1.0, 1.1, l.2 etc., or use method that is consistent and which makes location of specific terms and conditions easy for all parties.
5. Procedural agreements
6. Substantive agreements
7. Implementation provisions- BE SPECIFIC… Include dates by which certain commitments must be fulfilled and consequences or remedies in the event of a breach or failure to perform commitment.
8. Penalty provisions
9. Conflict resolution provisions
   a. mediation
   b. arbitration
   c. Damages/Penalties
10. Signatures of the principal negotiators.
    a. Principals (sign over printed name and title)
    b. Date and location of signing

11. Translator's declaration (if documents are translated in multiple languages)-Translator's declaration is used to verify that the document was translated by a certified professional translator. –An interpreter's declaration may be required if oral negotiations are interpreted.
12. Signing Ceremony-arrange for a public signing ceremony

a. Confirm commitments with media and public
b. Deliver message to constituency of how their interests have been protected/advanced
c. Seek public commitment from counterparts to the obligations and commitments they have made.

X. Dispute Resolution Mechanisms

This training manual does NOT offer a full discussion or description of dispute resolution mechanisms. The following list identifies various methods available to the parties in the event of a breach or violation of an agreement.

It is important to note that one of the options available to the parties during a non-productive negotiation is the utilization of outside (third party) neutrals who might assist the parties through mediation or arbitration to achieve a final agreement.

In the context of international trade negotiations, parties who are unable to resolve a trade dispute through the negotiation process, may pursue a more formal resolution by filing a complaint with the WTO Dispute Settlement Body (DSB). This option is also a BATNA for parties who must measure the strength of their claim before a DSB versus what they might achieve through negotiation or mediation.

The following list provides some of the options available to parties who are unable to reach an negotiated settlement:

A. Trade Disputes – inter-governmental (nation to nation)

1. World Trade Organization (WTO) Dispute Settlement Body (DSB)
2. North American Free Trade Agreement (NAFTA) dispute resolution provisions. Chapter ____
3. European Union
4. Other dispute resolution bodies related to trade issues
   a. World Intellectual Property Organization (WIPO)
   b. Patent and copyright agencies (national)
   c. Others

B. Commercial Disputes (International Contracts) The following organizations and websites provide listings of multiple mediation and arbitration organizations by subject matter and geographic location.

1. UNCITRAL – United Nations Commission on International Trade Law…..See www.arbitration-icca.org/directory – contains directory of international arbitration organizations and websites
2. CAMCA –Commercial Arbitration and Mediation Center for the Americas, See www.sice.oas.org/dispute
3. American Arbitration Assocation –International Section www.adr.org
4. International Chambers of Commerce Rules pertaining to international arbitration and dispute settlement.

X. Simulation Exercises

A. Need to determine authority of the parties
B. Interest identification
C. Developing your BATNA, reducing strength of your counterpart's BATNA
D. Developing multiple options
E. Uses of Objective Criteria to support your positions/proposals

XI. Appendices

A. GLOSSARY OF TERMS (TERMINOLOGY) USED IN NEGOTIATION, MEDIATION, & ARBITRATION

©
William W. Monning, J.D.

Agreement – A coming together of minds; a coming together of opinion or determination; the coming together in accord of two minds on a given proposition; in law, a concord of understanding and intention between two or more parties with respect to their relative rights and obligations or duties. The parties may confirm an agreement in the form of a written contract. An agreement may be verbal in nature.

Alternative Dispute Resolution (ADR)- a method of resolving disputes that does not involve using the official (governmental) court system. ADR can be understood to include negotiations, mediation, or arbitration. Parties to a formal legal proceeding may agree to ADR (mediation or arbitration) during the course of litigation of a claim or dispute.

Amendment- An addition, deletion, or change in a document. To make an amendment may include proposing new or different language in the proposed terms of a contractual agreement prior to reaching a final agreement.

Arbitration – The submission for determination of a disputed matter to private persons selected in a manner provided by law or by prior agreement. (contractual-arbitration clause, arbitration provision). The *arbitrator* is the person who arbitrates the dispute. An arbitrator acts as a private judge and is often selected by the parties to a dispute based on the arbitrator's subject matter expertise (construction, trade, employment). Arbitration is more formal than mediation. The arbitrator usually has *decision making authority*.

> **Binding arbitration –** The parties to an agreement agree to be legally bound (committed) to the ruling of the arbitrator. The arbitrator renders a decision in the case and the parties must abide by that decision. There is no legal appeal or recourse following a binding arbitration decision unless there is evidence of fraud, conflict of interest, or some other recognized conduct that would invalidate the arbitration. The arbitrator provides a decision that may include a formal "finding of fact", application of legal precedent, assessment of witness credibility, and award or other relief.
>
> **Non-binding arbitration-** The parties agree in advance to submit their dispute to a non-binding arbitration. The arbitrator's decision will not result in the losing party having to commit to any remedy. The purpose of a non-binding arbitration is for parties to obtain a "preliminary view" of how the case might be handled by a court (judge) or a formal arbitration. A non-binding arbitration can be useful to educate the parties as to the relative value of a case for settlement purposes.

Authority:

General- That which authorizes the agent to do everything connected with a particular business. Authority is the "power to make a decision" or "to make a binding commitment".

Limited- Limited authority means that the agent or representative of a government or business entity has precise instructions regarding commitment that can be made to reach an agreement. Government representatives must often clear the terms of an agreement with a higher authority. In the United States, a treaty agreement must be ratified (approved) by 2/3 of the members of the U.S. Senate.

BATNA- (Best Alternative to a Negotiated Agreement) – The "walk away" alternative to a negotiated agreement. The status quo or another options that can satisfy a party's interest without negotiating with a counterpart(s). A strong BATNA gives a party more negotiating power at the negotiating table. One measures the strength of a proposed option or solution against the attractiveness of the BATNA. A party anticipates the counterpart's BATNA and introduces objective criteria (facts) to make the counterpart's BATNA look weak.

Bilateral negotiation/agreement- Between two (2) people or parties (government, businesses, NGOs). **Multilateral-**among three (3) or more people or parties.

Caucus (noun or verb)- Noun: a meeting with one's own team members or associates or with a mediator or a representative of another party in a confidential setting—a meeting held away from the negotiating table. (verb) to caucus—the act of caucusing, of meeting privately with one's own teammates or associates.

Civil Law – a system of law based on codes and statutes developed by a legislative, parliamentary body. **Common Law**- the system of law based on usages, customs, and judicial decisions (precedent legal decisions) as distinguished from civil law.

Client- the person or party upon whose behalf or in whose benefit one negotiates. A lawyer represents a client. An agent may represent a business or government client.

Compradore **–**An intermediary, agent or advisor in a foreign country employed by a domestic individual or company to facilitate transactions with local individuals or businesses in the foreign country.

Conditional agreement- An obligation that only comes into effect if a certain condition is met. A party's obligation to perform a certain task or commitment may be dependent on the counterpart's performance of a certain task or obligation first. A seller's obligation to deliver goods or services to a buyer may be conditioned on the buyers delivery or presentation of a down payment, letter of credit, or some other means of payment.

Consideration- The inducement to enter into a contractual agreement. The cause, motive, price, or impelling influence which induces a contracting party to enter into a contract. Some right, interest, gain, advantage, benefit, or profit to one party, usually the promisor, or some forbearance, detriment, prejudice, inconvenience, disadvantage, loss, or responsibility, actor service given, suffered, or undertaken by the promisee. In a contract for goods or services, the seller offers his/her goods for money paid by the buyer.. The goods provided by the seller represent consideration. The money paid by the buyer represents consideration.

Contract-A promissory agreement between two or more persons (parties) that creates, modifies, or destroys a legal relation. An agreement, based upon sufficient consideration, to do or not to do a particular thing. A contract must be signed by the parties to the agreement.

Counterpart- An opponent or adversary in a negotiation. The other party or parties with whom one is negotiating. A Seller's counterpart will be the buyer. The counterpart is not necessarily adversarial in outlook.

Escape Clause – A provision in a bilateral or multilateral commercial agreement permitting a signatory nation to suspend tariff or other concessions (temporarily violate their obligations) when imports threaten serious harm to the producers or competitive domestic goods. (See General Agreement on Tariffs and Trade –GATT Agreement- Article XIX and U.S. Section 201 of the Trade Act of 1974).

In an employment contract or other personal service contract, an escape clause may be included to relieve one or both parties of their commitments (obligations) after some prior notification (usually written) or upon the occurrence of some event or circumstance.

Fraud- an intentional deception or representation known not to be true. To falsely represent facts knowing them to be wrong for the purpose of gaining an advantage or other result. The use of an intentional misrepresentation to induce another person to act in reliance on that false information to his/her financial or other detriment. Proof of fraud in a commercial agreement may relieve the party who has been defrauded from obligations under the agreement. Proof of fraud may subject the party who has perpetrated the fraud to fines, penalties, or criminal prosecution.

Impasse- a stalemate in negotiations. The parties are unable to move forward. The parties to a negotiation refuse to make concessions or explore options that could lead to an agreement. An impasse in negotiations may be broken by mutual agreement, by bringing a mediator into the negotiation, or by suspending negotiations for a period of time while the parties explore or review their positions within their own organizations, governments, or corporations.

Interests- Interests are what compel people to negotiate. Interests lie behind positions. Interests may include a party's desire for economic security, military security, political recognition/legitimacy, sovereignty, political autonomy or representation, sustenance, or specific underlying goals that motivate the person or party to seek concessions or acceptable solutions to a dispute, problem, or business opportunity.

Interim agreement – a partial agreement pending a final agreement. An interim agreement may be a partial agreement related to certain aspects of a complex negotiation. An interim agreement may bind the parties to certain conduct pending the outcome of an ongoing negotiation or dispute settlement proceeding.

A. Mediation-Involves the participation or inclusion of a "third party" neutral to help the parties to a conflict negotiate an agreement. The process of mediation is usually voluntary. The mediator has no decision-making authority. A mediation is less formal than an arbitration. A successful mediation results in the parties reaching an agreement, usually made enforceable by a written agreement (contractual). The mediator may meet privately with individual parties in caucus meetings (caucuses). The mediator helps the parties to negotiate an agreement but because of the voluntary nature of the process, a party may leave the mediation and pursue other remedies or recourse if desired. A means of "alternative dispute resolution".

Non-negotiable demands-Offers or proposed solutions for which the party making the offer will accept no other solution. Non-negotiable demands are intended to give the counterpart no negotiating power. A "take-it-or-leave it" offer may appear to be a non-negotiable demand. Non-negotiable demands may lead to *impasse*, or blocked negotiations where no agreement can be reached.

Objective criteria- a set of fair standards. Facts, scientific evidence, precedent legal decisions, expert opinion or testimony, or other information that may be introduced to support a party's proposed offers, proposals, or solutions. Objective criteria can also be introduced to demonstrate that a counterpart's position, proposal, or offer is unreasonable by comparison to established values, holdings, market rates, or other criteria.

Offer- noun – a proposal, a presentation of an option or solution for settlement of a negotiation or a component of a negotiation. Verb- the act of presenting a proposal for consideration by one's counterpart. **Acceptance –** the act of agreeing to an offer; to accept or agree to the terms that have been offered. To create a valid and enforceable contractual agreement there must be proof of an offer and an acceptance with some form of valuable consideration exchanged between the contracting parties.

Opening statement- a preliminary statement or introduction of a party's interests in a negotiation, mediation, arbitration, or court proceeding. An opening statement may include matters of protocol including introduction of team members, greetings to counterparts, and an articulation of the broad aspirations/goals of the party. **Closing statements** involve a summation of facts, conclusions, achievements, or positions taken. A rearticulation of a party's interests.

Options- possible solutions in a negotiation. By generating or creating multiple options (solutions) the negotiators (parties) may create more opportunities for settling the dispute or solving the problem. A good negotiator will create or generate multiple options as part of the preparation and planning process. These options can then be presented for consideration at the negotiating table where one's counterparts can also be invited to generate multiple options or solutions to the problem that is the subject of the negotiation.

Party-parties- The person or organization that participates in a negotiation or signs a contractual obligation. The parties to a contract or a negotiation are the people or representatives of organizations, corporations, or governments whose interests are being discussed, negotiated or effected.

Positions- Parties present positions in negotiations that may set forth a desired outcome, solution, or quantitative proposals. A party to a negotiation may become fixated on one position while refusing to look or consider other options or solutions. A party may present "an opening position" with the intent of amending or changing that position in exchange for a specific concession or offer from the other party.

Proposal(s)- An offer made in the negotiation process. A suggested solution or element of an agreement. A proposal is generally presented by one party to another for consideration or response. A proposal may be presented verbally or in writing. A proposal may be presented at the negotiating table or may be communicated to another party in writing via various communication mechanisms. (telefax, email, mail, etc.)

Counter-proposal-A party's response or reply to another party's proposal. The counterproposal may modify or amend the text or content of the original proposal. A counter-proposal may add conditions or elements for consideration of the original proposing party.

Reciprocity-Equally binding obligations. If one party makes a concession on tariffs or terms of trade, the trading partner(s) is expected to make an equivalent concession or adjustment. The terms and conditions of a negotiated contract usually set forth reciprocal obligations, responsibilities, or duties. A *quid pro quo* is an exchange of items, services, conduct, or actions designed to compensate one's counterpart for his/her actions, payments, contributions, etc.

Settlement- the negotiated resolution of a dispute. An agreement reached between or among parties to a dispute that may include future obligations or commitments. A settlement agreement may be enforceable in a court or before another tribunal.

Stalemate – See *impasse*. A moment in the process of negotiations when the parties can make no further progress.

Tribunal- a formal hearing or forum for the investigation or resolution of a dispute or conflict. A tribunal may be established on behalf of a national entity or an international body or commission.

(See also: Dictionary of International Trade, Edward G. Hinkelman, 3d Edition, World Trade Press, Novato, California, 1999, and www.commercialdiplomacy.org.)

2-16-02

B. Bibliography

NEGOTIATION, MEDIATION, & CONFLICT RESOLUTION
Selected Bibliography

Cohen, Raymond, *Negotiating Across Cultures*, United States Institute of Peace Press, Washington D.C., 1995.

Hampson, Fen Osler, *Multilateral Negotiations,* The John Hopkins University Press, Baltimore & London, 1995.

Fisher, Roger, William Ury, and Bruce Patton, *Getting to Yes, Negotiating Agreement Without Giving In,* Penguin Books, 2nd Edition, New York, 1991.

Fisher, Roger, *International Mediation: A Working Guide,* A Harvard Negotiation Project Publication, Cambridge, 1993.

Ikle, Fred C., *How Nations Negotiate,* Harper & Row Publishers, New York, 1987.

Moore, Christopher W., *The Mediation Process,* Jossey-Bass Publishers San Francisco, 1986.

Raiffa, Howard, *The Art and Science of Negotiation,* Harvard University Press, Cambridge, Ma., 1996.

Rubin, Jeffrey Z., *Dynamics of Third Party Intervention, Kissinger in the Middle East,* Praeger Publishers, New York, 1981.

Ury, William, *Getting Past No, Negotiating Your Way from Confrontation to Cooperation,* Bantam Books, New York, 1991.

Zartman and Berman, *The Practical Negotiator,* Yale University Press, New Haven and London, 1982.

Also, *The Negotiation Journal, On the Process of Dispute Settlement,* Plenum Press, New York, published six times per year.

Marquez, Garcia Gabriel, *News of a Kidnapping,* (non fiction account of drug cartel and government negotiations on hostage taking.) 1997.

Short Bibliography
Trade and Commerce

Feketekuty, Geza, *The New Trade Agenda,* Occasional Paper 40, Washington D.C.: The Group of Thirty, Washington D.C., 1992

Feketekuty, Geza, *International Trade in Services: An Overview and Blueprint for Negotiations,* Cambridge, Ma: Ballinger for the American Enterprise Institute, Washington D.C.

Feketekuty, Geza, *The Link Between Trade and Environmental Policy.* Minnesota Journal of Global Trade, Volume 2, Issue 2, Summer 1993.

Hart, Michael with Bill Dymond and Colin Robertson, *Decision at Midnight: Inside the Canada-US Free Trade Negotiations,* UBC Press, Vancouver, 1995

Lanjouw, G.J., *International Trade Institutions,* Open University of the Netherlands, Longman Publications, New York, 1995.

Mowery, David C. and Nathan Rosenberg, *Technology and the Pursuit of Economic Growth,* Cambridge University Press (1994)

Spero, Joan Edelman, *The Politics of International Economic Relations,* St. Martin's Press, Fourth Edition, New York (1990)

Susskind, Lawrence, *Environmental Diplomacy: Negotiating More Effective Global Agreements,* Oxford University Press, New York (1994)

Roessler, Frieder, *Guide to GATT Law and Practice,* World Trade Organization, 6th Edition (1995)

PEOPLE	INTERESTS	OPTIONS	OBJECTIVE CRITERIA	BATNA
• For every party to a negotiation (including your own), you should know: -- What government ministries or agencies are involved? -- What non-government groups are involved? -- What companies or industries are involved? -- Who are the individuals involved? What special relationships or connections might they have?	• What are the interests of each of the parties to a trade problem? • What do they want and need to come out of a solution? Who are they accountable to? What are the consequences of their action or inaction? - Remember: Government ministries or agencies all have different interests to protect, as do individuals.	• What options are available to each of the negotiating parties in trying to solve a specific trade problem? • For example, should parties hold informal consultations or call for a formal negotiation? Should they refuse to negotiate until certain conditions are met? Could one or more parties refuse to admit the need for negotiations?	• Objective criteria are domestic, foreign and international principles, rules and regulations that you would use to examine and solve a trade problem. • Other examples of objective criteria include scientific studies, white papers, and/or past trade problems that could be used as precedent cases. -- Remember: Different negotiating parties or groups may share the same objective criteria, but they may interpret them differently.	• A BATNA is a **B**est **A**lternative **t**o a **N**egotiated **A**greement. • It is the option, strategy or plan that you and your negotiating team will use to solve a trade problem if negotiations fail and/or the parties are unable to reach a mutually beneficial agreement. • A BATNA is not your preferred outcome. It is your final option. • In many cases, all parties to a negotiation will keep their BATNAs a secret. By keeping your BATNA a secret, there is added pressure and incentive to reach an agreement.