

# 1 Introduction

A strife of interests masquerading as a contest of principles. The conduct of public affairs for private advantage.<sup>1</sup>

## An expanded role for international negotiation

Justice and fairness are not considerations that naturally come to mind when we think of international negotiation. This is, after all, a political activity driven by the objectives of individual countries and the prospect of mutual gains. That negotiation is all about the pursuit of narrow self-interests, with the backup of whatever power and skills can be mustered, is a common notion with well-established roots. Yet issues of justice are a major cause of conflict. Disagreements over justice, like conflicts of interests, can turn violent and lead to wars.<sup>2</sup> They all too often undermine the capacity of negotiation to produce acceptable and durable solutions to disputes.

Negotiation is a joint decision-making process in which parties, with initially opposing positions and conflicting interests, arrive at a mutually beneficial and satisfactory agreement. It normally includes dialogue with problem-solving and discussion on merits, as well as bargaining and the exchange of concessions with the use of competitive tactics.<sup>3</sup> More than other tools such as arbitration and adjudica-

<sup>1</sup> A. Bierce, *The Enlarged Devil's Dictionary* (1967).

<sup>2</sup> For a discussion of how considerations of justice can play a role in the outbreak of wars, see Welch (1993).

<sup>3</sup> Traditional negotiation analysis distinguishes between distributive and integrative processes (Walton and McKersie, 1965; Pruitt, 1981). The former refers to competitive, 'win-lose' bargaining in which selfish parties seek merely to maximise their own gains. The latter refers to 'win-win' negotiations in which parties cooperate to identify or create solutions of high joint gains which eliminate the need for costly concessions.

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tion, this is a flexible method of resolving differences which leaves the parties themselves with considerable control over the process and the outcome. Every party usually exercises leverage based on a variety of sources, and at the very least based on its ability to threaten to walk away from the table. Negotiation can bring on board new and needed parties by virtue of promising them 'gains from trade'. It can result in the creation or identification of new solutions to shared problems, and lend legitimacy to and facilitate the implementation of them as they have been agreed in a process of deliberation. Negotiation is used not only to produce agreement on the division or exchange of particular resources or burdens, but also to establish and reform institutions, regimes and regulations that will help to govern future relations between parties.

Governments have always relied on this activity to manage their relations. In the last three decades, however, growing interdependence among states and the recognition of a range of new threats to human survival and well-being have increased dramatically the significance, scope and complexity of international negotiation. Among the factors which have driven this expansion are the transborder nature of the threats, the need for voluntary multilateral cooperation and coordinated measures to tackle them, and the insufficiency or ambiguity of existing international regulations. Today negotiation is the principal means of collective decision-making, rule-making and dispute settlement in the management of transboundary issues. More broadly, it is fundamental to all efforts to achieve a measure of stability and order in the post-Cold War era. Environmental degradation, trade, arms control, economic integration and development, ethnic-sectarian conflict, the break-up and succession of states, and human rights are only some of the questions with which international negotiators now grapple.

Issues of justice and fairness lie at the heart of problems in every one of these areas. Global climate change, for example, threatens many countries with devastation primarily due to the actions of other states. Yet negotiations concerned with this problem keep stumbling over the dilemma of how to distribute the formidable costs of cutting greenhouse gas emissions. Who should have to reduce their emissions

In fact, most negotiations include both integrative and distributive processes, but few analyses have explored the interplay between the two. Exceptions include Lax and Sebenius (1986) and Zartman and Berman (1982).

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and who should pay for it, given the resource inequalities and sharp differences in past and current emission levels (responsibility for the problem) between states? How much should emissions be cut and by what time, considering that reductions in the near term are prone to hamper the economic development of poorer countries? The cooperation of these countries will clearly be required to stabilise rising emission levels. But it is unlikely to be forthcoming unless industrialised states, as the principal atmospheric polluters to date, address at least some of the requests for justice advanced by the developing world.<sup>4</sup> Compensatory justice, expressed through preferential treatment of less developed countries (LDCs) in the form of exemptions and financial and technical assistance, was a cornerstone of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, one of the most successful environmental agreements ever negotiated.

The growing dilemma of siting toxic nuclear waste and other hazardous facilities is partly the result of perceived injustices arising from inadequate representation or regard for all affected parties and interests in negotiations both within and between countries.<sup>5</sup> Contentious arguments about economic justice underlie negotiations over debt relief and repayments between industrialised states and international financial institutions on the one hand, and poor debtor nations on the other. Talks within the General Agreement on Tariffs and Trade (GATT) and, more recently, the World Trade Organization (WTO) have repeatedly been brought to the brink of collapse by bitter conflicts over unfair trade practices involving the EC, the US, Japan, LDCs, import-competing domestic producers and other parties. Charges that many countries remained too protectionist and were getting a 'free ride' on the open markets of others led the Uruguay Round of the GATT to treat cardinal GATT norms as negotiable rather than automatic obligations. Some observers have pointed to this development as a danger to the global trading system, whose strength has been built over the decades on unqualified application of these norms. In other areas, including in talks over nuclear non-proliferation, charges of free-riding and inadequate implementation of prior agreements continue to shape the bargaining process.<sup>6</sup>

<sup>4</sup> This is discussed further in Shue (1992).

<sup>5</sup> See *Risk: Health, Safety and Environment*, Vol. 7, No. 2, 1996 (issue devoted to fairness issues in siting decisions, based on a symposium held at the International Institute for Applied Systems Analysis, Laxenburg, Austria).

<sup>6</sup> See further chapter 6.

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## Is there a place for justice and fairness?

Ethical issues thus arise in international bargaining. But under what circumstances, if any, do such considerations genuinely constrain the behaviour of negotiators? What is their motive for behaving justly? What criteria are used, or should be used, to recognise when justice has been done? A review of the pertinent literatures, particularly on justice and on international relations, quickly reveals how debated and contested these questions are.<sup>7</sup> It is not an intention here, nor a possibility, to provide a comprehensive survey of these debates. This and the following chapters will instead refer to the literature selectively, as required, to explain concepts and arguments which are central to this study.

The predominant notion from the time of Plato to the present has been that the bounds of justice coincide with state boundaries and that it is not, and cannot be, an issue in relations between or across states. Principles of distributive justice apply to the contemporary members of a single group or society with shared values and opportunities for mutually beneficial cooperation, and specifically to the distribution of the cooperative gains among those members (Rawls, 1971). There is indeed an extensive record of the influential role played by concepts of justice and fairness in interpersonal and intrasocietal negotiations, particularly in the social-psychological literature (Deutsch, 1973; Bartos, 1974; Lind and Tyler, 1988; Benton and Druckman, 1973; see also Young, 1994).

By contrast, work exploring when and how such concepts matter in international negotiation is very limited. It generally deals with isolated case studies and offers a variety of conflicting propositions (Druckman and Harris, 1990; Albin, 1997a; Zartman, 1995; Zartman *et al.*, 1996). Predominant approaches have honoured the Realist tradition and its arguments about the limited applicability of morality to state conduct and interstate relations. These point to conditions in international affairs such as different rules of conduct and ethical notions among states (the absence of a shared moral purpose and of agreed ethical criteria), the lack of a supranational authority capable of ensuring compliance with norms, and states' inevitable tendency to

<sup>7</sup> Barry (1995) points out that theories of justice can be distinguished on the basis of their answers to three questions: what is the motive for behaving justly? What are the criteria for a just set of rules? Why would somebody with the specified motive comply with rules which are just according to the specified criteria?

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pursue their own interests and define any moral obligations narrowly in terms of these and duties to their respective peoples. The approaches have thus focused on the role of power and self-interest in international bargaining (Snyder and Diesing, 1977; Habeeb, 1988). A party's readiness to make concessions and accept a particular deal is supposedly based on a calculation of its relative strength *vis-à-vis* the other side. Parties bargain to secure all they can acquire rather than their 'just' or 'fair' share, which may be more or less. The outcome will largely reflect the relative distribution of power, particularly in cases of asymmetry. 'Power' is defined in a number of ways ranging from conventional military and economic resources to the possession of skills, access to information and the exercise of leadership.<sup>8</sup> A key element is certainly the value of a party's best alternative to a negotiated agreement, or 'BATNA' (Fisher and Ury, 1981). The higher that value the less dependent the party is on reaching an agreement and the more it can afford to concede little, take risks and wait out the other side. It cannot be so abusive as to remove all incentives to negotiate, but may appease a weaker party by offering some advantage over a continued state of conflict on unequal terms.

The exploitation of power advantages and the constant striving to maximise self-interest do not imply that international negotiations are necessarily considered amoral or unprincipled. First, the classic Realist view holds that the selfishness of states is grounded in and justified by a moral responsibility of national leaders to the security and well-being of their own populations. Even if state action was subject to some universal moral principles, no leader can be required to adhere to such principles or help another leader fulfil her duties when this compromises his primary moral obligations towards his own people (Morgenthau, 1971, 1948). Secondly, even the staunchest Realist would hold that the voluntary conclusion of an agreement creates an obligation to honour it. Justice is achieved when parties comply with whatever terms they have accepted freely and rationally.

The intellectual roots of this minimalist view are found foremost in the moral theory of Thomas Hobbes.<sup>9</sup> In the Hobbesian 'state of nature', men as selfish competitors for scarce resources share an interest in agreeing to constrain their behaviour, to avoid mutually destructive conflict. Until such an agreement has been reached, men

<sup>8</sup> This is further discussed in chapter 5.

<sup>9</sup> See Hobbes (1991).

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are effectively at war and have no obligations: they possess unlimited 'natural rights' and liberties to do whatever they can to preserve and please themselves, including at the expense of the lives and property of others. The concept of natural rights, and Hobbes' argument that there are no independent criteria of justice or fairness, mean that such considerations are inapplicable to the process of negotiation and to the terms of any agreement. Until an agreement is concluded, there are no constraints on what a party may do or take to better its own situation other than the limits of its own strength. However, an agreement creates obligations of compliance, for supposedly free parties have themselves chosen to conclude it and to constrain their actions accordingly, in the expectation of mutual benefit. As long as enough parties comply to maintain the collective benefits of the agreement, it is morally binding as well as rational (self-serving) to implement it. Any gains to be had from 'cheating' (failing to comply while benefiting from the compliance by others) will be undermined by the long-term consequences of being excluded from future cooperative ventures.<sup>10</sup> There can never be conflict between justice and power or self-interest for negotiated agreements will reflect the balance of forces, and justice as much as rationality require that they be honoured.

One major theory, defining justice as 'mutual advantage', is founded on these Hobbesian and Realist premises. Arrangements are just if based on terms which the parties themselves have established and agreed to honour. They must be mutually beneficial, since parties strive to maximise their own gains. So justice cannot involve a pure redistribution of resources, nor involve parties which are unable to reciprocate and contribute to the joint gains. For David Gauthier, a representative of this school of thought, the starting positions for negotiations, and the tactics and leverage used, may well reflect power inequalities which result from the parties' own legitimate resources and efforts to better themselves. Acquisitions may be illegitimate if, for example, they were acquired by exploiting another party's resources. However, Gauthier argues that in certain circumstances agreements may legitimately reflect such situations as well. First, one party may exploit another's resources if this is required to

<sup>10</sup> According to Hobbes, humans are unable to internalise this logic and to abandon voluntarily the goal of maximising short-term self-interests. Hence the need for a sovereign ruler to formulate moral codes, and to enforce agreements on mutual constraints which leave all parties better off than in a state of non-cooperation.

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avoid worsening its own situation, or if adequate compensation is provided. Secondly, if the confiscation of resources is to be considered unjust in the first place the deprived party must be the legitimate owner of them (having acquired them through its own labour), must have been using (or intended to use) them, and must have been affected negatively by their removal. Thirdly, mutual gains from negotiation is considered a practical necessity which must override other considerations whenever they are conflicting. Past injustices can therefore be corrected or compensated for, only as far as it is consistent with offering all parties gains from an agreement (Gauthier, 1986). Whatever their specific terms, agreements are thus considered legitimate chiefly by being mutually advantageous and by virtue of having been concluded voluntarily.

In this approach, the motivation to behave justly is entirely self-serving and calculating. The acceptance of principles of justice is viewed as a necessary compromise between egoistic parties who are too equal to pursue their interests without regard for the other or to do injustice without suffering unacceptable costs. The adherence to moral constraints depends on the existence of a balance of power in this sense: 'We care for morality, not for its own sake, but because we lack the strength to dominate our fellows or the self-sufficiency to avoid interaction with them. The person who could secure her ends either independently of others or by subordinating them would never agree to the constraints of morality. She would be irrational – mad' (Gauthier, 1986, p. 307).

Realist-inspired approaches face considerable challenges. A substantial body of literature on international relations, political theory and political philosophy now points to the explanatory power of norms rather than 'realism' (Nardin, 1983; Frost, 1986; Beitz, 1979; Rittberger, 1993). It examines why and how norms and normative regimes, including concepts of justice and fairness, influence state conduct and interstate relations.<sup>11</sup> International negotiation is used to build regimes in particular issue areas (Spector, Sjöstedt and Zartman, 1994). As this book's case study on international trade talks illustrates, once they are well established, negotiation is itself influenced by the

<sup>11</sup> The concept of 'regime' is defined as a set of principles, norms, rules and decision-making procedures, implicit and explicit, around which actors' expectations converge in a given issue area of international affairs (Krasner, 1983). 'Norms' are rules or standards of behaviour defined in terms of rights and obligations (Brown, 1997). These include, but are not limited to, concepts of justice and fairness.

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principles and norms which the regimes embody. One analyst points out that the conditions in international affairs on which Realist arguments are based exist also in interpersonal and intersocietal relations, without for that matter eroding the role of morality in those relations and that widely accepted norms, moral and legal, are indeed generally observed in the international arena (Barry, 1989b). States usually adhere to norms because doing so overlaps with rather than contradicts their interests, broadly defined, in an age of interdependence.

Brian Barry's theory, probably the most serious attack to date on the notion of justice as mutual advantage, holds similarly that concern about justice is driven by a desire to defend one's actions on impartial grounds which others cannot reasonably reject and which can elicit voluntary agreement and cooperation (Barry, 1989a, 1995). He admits that such a desire and a habit of considering the interests of others are more likely to be cultivated in largely equal parties owing to their experience of interdependence and their need to secure the collaboration of others. It is a broadly held view that the absence of sharp power inequalities enhances the motivation to negotiate and otherwise act justly, while their presence may exclude a role for justice.

### **What is a just and fair agreement? Competing criteria**

How do we know when justice has been done? How is a just solution to be distinguished from an unjust one? The matter of what criteria should be (or are in fact) used to answer these questions is deeply contested. It raises issues about how such values relate to the bargaining process and what power inequalities and self-interests, if any, may be reflected in arrangements which are to be accepted as just or fair. There are basically three types of standards, further discussed in chapter 2, which can be employed: internal, external, and impartial ones.

*Internal or contextual criteria* are intrinsic to the situation at hand. Realist-inspired approaches, including that of justice as 'mutual advantage', rely on these criteria. This is also the case of the few models in the traditional negotiation literature which are at all concerned with this subject. They stress the 'rational' or selfish purposes of negotiation, the absence of one overarching or universal standard by which to judge agreements, and often the value of each



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party's BATNA as the basis for determining the meaning of justice or fairness. In game-theoretical approaches such as those originally put forward by Nash (1950) and Braithwaite (1955), the nature of a just and fair outcome is defined inside the negotiation process without reference to any external criteria. The most permissive approach regards *any* outcome as just by virtue of it having been agreed, with no constraints imposed on the standards applied or methods used. Parties can bargain to acquire everything possible given their weight and tactical advantages (Zartman, 1995). More specific contextual criteria are also used. Many pose enormous challenges regarding application because of the practical difficulties of measuring gains, BATNAs and so forth in any common unit. One group of standards is based on the premise that parties should gain to about the same extent from a negotiated agreement. In Nash's famous concept, a fair solution yields to each party one half of the maximum gains it can rationally expect to receive (Nash, 1950). In another notion, a just agreement should give parties the value of their respective BATNAs and divide the remaining benefits proportionally to the worth of their contributions to the cooperative venture (Gauthier, 1986).

*External criteria* here refer to major principles of distributive justice. Their general substantial content is independent of any particular negotiation or allocation to be judged. Principles which are prominent in both the literature and actual practice include equality, proportionality, compensatory justice and need. The principle of *equality* requires parties to receive identical or comparable rewards and burdens. The original Aristotelian notion stresses the importance of unequal (proportional) treatment of unequals as much as the equal treatment of equals.<sup>12</sup> In other words, parties should be treated the same only if they are indeed equal in all respects relevant to the distribution. Equality in this interpretation means denial of discriminatory treatment on indefensible grounds rather than equal treatment of everyone *per se*.

The principle raises the question of what exactly is to be treated equally, and of how an outcome of actual equality is to be achieved when the parties are unequal to begin with. Divergent resources and preferences mean that parties in practice gain unequal levels of utility from acquiring the same goods in equal amounts. A common interpretation is equality of utility or welfare. It requires measuring and

<sup>12</sup> See notably Aristotle's *Nicomachean Ethics*.

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comparing individual experiences of welfare from consuming particular goods, and distributing them accordingly to ensure equality of well-being. Rawls (1982) argues that this, if at all possible, is not necessarily desirable or fair. The proposition that resources should be distributed to render people's 'functioning capabilities' the same also poses problems of measurement and comparison (Sen, 1992). They are bypassed in the notion of equality as 'equal shares', which refers to the uniform distribution of resources regardless of differences in preferences, needs, contributions or other considerations (Pruitt, 1981). One approach to intergenerational equality sets out three obligations of current generations to future ones: the conservation of options through preservation of the diversity of the natural and cultural resource base; the conservation of quality through maintenance of the quality of the planet; and the conservation of access through the provision of equal access to the earth's resources (Weiss, 1989).

A second major criterion of distributive justice is *proportionality*, which holds that resources should be allocated in proportion to relevant inputs. Justice is achieved when each party's ratio of inputs to rewards or burdens is the same, and injustice is experienced in relation to these ratios rather than in absolute terms. The principle originates in Aristotle's argument for distribution in proportion to merit when relevant inequalities among parties justify deviation from the equality principle. Two types of input are particularly relevant: assets (e.g., skills, intelligence, wealth, income, status) and contributions (i.e., actions and efforts adding value to the collective or disputed goods). The proportionality norm is similar to the concept of *desert* (Barry, 1965; Sidgwick, 1901). In some versions of this concept, parties deserve rewards and burdens only for efforts and actions which are voluntary and deliberate. The more positive (or negative) contributions a party makes intentionally, the more rewards (or burdens) it merits.

There are numerous interpretations of the proportionality norm. Those which distribute resources and burdens proportionally so as to achieve an outcome of equality in some respect are frequently confused with equality norms. 'Equal sharing of responsibility' and 'equal sacrifices' entail that parties make concessions and accept burdens in proportion to their ability to do so, which may be measured by level of economic development and national income (Kelley, Beckman and Fisher, 1967). Thus all parties will in a sense