Justice and Fairness in International Negotiation

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Contents

Figure

1 Introduction

> A strife of interests masquerading as a contest of principles. The conduct of public affairs for private advantage.[1]

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.[2] 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.[3] More than other tools such as arbitration and adjudica-

[1] A. Bierce, *The Enlarged Devil's Dictionary* (1967).

[2] For a discussion of how considerations of justice can play a role in the outbreak of wars, see Welch (1993).

[3] 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.

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).

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.[4] 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.[5] 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.[6]

[4] This is discussed further in Shue (1992).

[5] 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).

[6] See further chapter 6.

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.[7] 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

[7] 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?

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.[8] 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.[9] 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

[8] This is further discussed in chapter 5.

[9] See Hobbes (1991).

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.[10] 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

[10] 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.

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.[11] 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

[11] 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.

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

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.[12] 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

[12] See notably Aristotle's *Nicomachean Ethics*.

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

bear equal costs from their respective standpoints. Others argue that distributive justice and fair division are achieved when net rewards (e.g., money, education) are allocated in direct proportion to investments (e.g., time spent, risks taken) so that everyone's ratio of profit to investment is the same (Adams, 1965; Walster, Walster and Berscheid, 1978). The 'opportunities' norm, by contrast, equates equity with a form of efficiency by allocating resources in proportion to how well each party can use and benefit from them.

Another principle is *compensatory justice*. It stipulates that resources should be distributed to indemnify undue costs inflicted upon a party in the past or the present. At times it is mistakenly used synonymously with a fourth criterion, that of *needs*. While compensatory justice involves claims based on actions resulting in unjust burdens, needs are based on some supposed general standard to which people or nations are entitled. Compensatory justice ignores possessions (or lack of these), but the needs principle holds that resources should be allocated relative to the strength of need so that the least endowed party gets the greatest share. Often driven by the past, compensatory justice links resource distributions only to identifiable wrongdoings and may therefore reward the already well endowed. The needs norm, by contrast, focuses on the present and aims to meet basic wants irrespective of their origins. But both criteria are comparative: is the compensation adequate for the inflicted harm? Who is the most needy? Neither includes considerations of contributions. And neither aims to erase inequalities or to establish an outcome of equality between parties *per se*: the objective is to rectify specific injustices or to ensure a basic level of well-being. A compensatory approach to world poverty might, for example, aim to remedy any economic and developmental damage done to Third World countries which take steps to protect the environment. A needs-driven distribution would instead target the world's poorest peoples or countries regardless of their preparedness to participate in environmental protectionism.

A third set of approaches, arising from the philosophical literature, employ so-called *impartial standards*. These delineate requirements which a negotiation process and an agreement must fulfil in order to be taken to be just and fair. They limit what interests may be pursued and what kind of power may be exercised, if any. The purest expression of impartiality is John Rawls' well-known theory of 'justice as fairness'. His argument that principles of justice are only those which parties would select and agree upon if they were ignorant of

their own identity and position is meant to purge the bargaining process of all inequalities in individual resources and advantages, including skills and power. The parties are denied any information about their own interests and circumstances because it is taken to be irrelevant to, and is likely to bias, the choice of principle (Rawls, 1958, 1971). The need for a 'veil of ignorance' arises from the assumption that parties are motivated by a narrow interest to maximise their own gains. Discussion and negotiation remain essential behind the veil, but clearly take a form radically different from any common practice.

This notion, so important in the philosophical literature, cannot be operationalised in actual international encounters which fail to meet the Rawlsian criteria of a fair selection situation. It stands in contrast to Brian Barry's theory of justice as impartiality, which draws on that of Thomas Scanlon. In Barry's and Scanlon's approach, the motivation is to be able to justify one's behaviour on reasonable grounds. Here, justice is 'what can freely be agreed on' by parties who are equally well placed, notably in the sense of being able to reject and veto an agreement (Barry, 1995, p. 51; see also Scanlon, 1982). It can be justified and defended on impartial grounds, and cannot be reasonably rejected by an outside observer or a party looking beyond its own narrow self-interests. The core criterion is the voluntary acceptance by parties of whatever arrangements are proposed, and their acceptability from a more general detached viewpoint. What is just elicits consent without the use of threats or rewards, so there is no place for negotiations which take place in a coercive or manipulative context. Agreements held in place by force are clearly seen as illegitimate. Moreover, the value of non-agreement points or BATNAs, however acquired, has no role in determining the nature of just distributions (Barry, 1989a). Justice as impartiality is advocated particularly when there are conflicting conceptions of the good which cannot be resolved through rational reasoning (Barry, 1995). Others express a looser notion which entails constraining the use of power and the pursuit of self-interest. It is a common view that the initial bargaining positions, the starting point for negotiations, and any leverage utilised in bargaining should only reflect a party's own legitimate endowments and efforts to better itself, without taking advantage of another. Strategic advantages and strong BATNAs acquired through activities which worsened the bargaining position or overall situation of another party cannot be exploited or define a party's stake in negotiations, if just agreements are to result (Shue, 1992).

The approach of this study

What justice is and requires is thus disputed. The same arrangement may be perfectly appropriate by one set of criteria, and devoid of all moral content and acceptability by another. Of course, the dispute exists not only in the literature. It is very much alive in the world of international negotiation. Different principles affect parties differently. The fact that a single standard rarely emerges as salient and unchallenged means that several competing criteria are often invoked, for reasons which may involve genuine ethical conceptions as well as tactical calculations. There is a virtual consensus on one score, however, despite different understandings of what is just and fair: negotiations and agreements which parties perceive as such are far more likely to be accepted and to lead to successful outcomes. Therefore, the way in which competing ethical notions are handled in the process often has a direct impact on its results.

The purpose of this book is to investigate empirically when, why and how justice and fairness matter in international negotiation. What motivates negotiators to take such considerations into account? What content do they give to these concepts in complex political talks, and how do they tackle conflicting ideas of what is right or reasonable in particular situations? The book seeks to illuminate what conditions and circumstances permit justice and fairness to play a role, what effect these values have on the bargaining process and how, if at all, they filter through to and influence the formulation of the terms of international agreements. In doing so the book will shed light on two larger questions: how do other influential factors such as power relations, domestic politics and interests, and access to knowledge and information (or lack of it) interact with and affect the role of justice and fairness? And how important are these concepts for the effectiveness of international negotiation? The heart of the study consists of detailed case studies drawn from four major areas of international relations: trade, the environment, ethnic and territorial conflict, and arms proliferation and regulation.

It is not an objective to address questions posed by political philosophers about the nature of a just social order, or the formulation of principles for the conduct of negotiations and the distribution of resources in society. These intellectual debates are obviously significant. They fall outside the scope of this work, however, because it focuses on forces which actually drive the dynamics of international

negotiations. Discussions in the literature on theories of justice, and on norms in international relations, usually take place at a too general or too abstract level to be helpful in this area. Young (1994) argues that major theories of justice fail to explain even how domestic societies, in practice, define the concept and resolve problems regarding the distribution of public resources and burdens. The treatment of justice and fairness in the negotiation literature is very limited, as chapter 2 notes in more detail. The aim then is to illuminate the meaning given to these concepts and their impact at the micro-level, in real bargaining situations. The emphasis therefore falls on examining empirically what parties perceive as just and fair in particular contexts, and when and how they act upon those conceptions.

This does not mean that justice and fairness become solely contextual or subjective notions accepted at face value, as the next section below will show. Nor are they assumed always to be important, for they are sometimes washed out in the negotiation process by other considerations. Finally, these concepts are not taken to be influential only when negotiators refer to or consciously think of them. The extent to which the language of equity is actually used in international negotiations varies between issue areas and countries. Such references are common in, for example, climate change and recent trade negotiations. They are peripheral or even absent in the language of arms control talks; yet, the duty of compliance with freely negotiated agreements is one principle among others which is taken very seriously because of its implications for national and international security. In all the negotiations covered in this volume, high-level representatives of the parties indicated in interviews that they focused on the concrete issues and proposals at hand and did not reflect on or discuss justice and fairness at a general or philosophical level. In the talks within the United Nations Economic Commission for Europe (UN-ECE) which led to the 1994 Second Sulphur Protocol, for example, negotiators rarely articulated their views and positions in these terms and were uncomfortable using them to analyse their experience. Concepts of justice and fairness were nevertheless strong underlying currents, as we shall see. The principles of inflicting no harm, and of differentiating obligations based on relative contribution to ecological damage, abatement costs and economic ability, became particularly influential.

Justice as a balanced settlement of conflicting claims

Despite the emphasis on empirical analysis, it is necessary to lay out the overarching concept of justice which has informed this study. An inquiry of this kind calls for some *a priori* notion of what it entails. Otherwise the result may be merely a description of what various persons or countries held to be just or fair on different occasions. There are usually a number of principles, and interpretations of these, which parties can invoke credibly in any one context. Their own situations and interests tend to influence their choice of principle, particularly in the initial stages of negotiations. Moreover, international negotiators are known sometimes to use ethical arguments for purely tactical purposes, and to exploit power inequalities to secure their objectives. For reasons such as these, some independent criterion is needed in order to assess what arguments are worth taking seriously.

What is the motivation for acting upon considerations of justice and fairness? Collectively, international negotiators employ such principles as a tool to reach an agreement. They are used to overcome conflicting interests and claims, and to build consensus on the nature of an acceptable outcome. In the initial phases of bargaining, the parties usually formulate their positions and proposals based on relatively narrow concepts of what would be beneficial or fair to themselves. They are naturally focused on their own interests and concerns, and may still know little about those of the other side. As the process continues they become confronted with other notions of an appropriate settlement, backed up by different principles and claims. If a positive outcome is to be achieved, each party must normally be prepared to consider and eventually endorse a more balanced set of arrangements which others can accept as reasonable and not too self-serving. It is in this phase that ideas of justice and fairness often come into play which influence the movement from original positions, the exchange of concessions, and the shape of the ultimate agreement. The motivation to take these ideas seriously recalls Barry's argument about the concern to be able to justify one's behaviour on grounds which others cannot reasonably reject.

We have noted that justice and fairness remain contested notions in current scholarly debates. The case studies which follow show that in actual international negotiations, several conflicting criteria typically

exist which parties can legitimately claim to be applicable and to deserve merit. A notion of what is 'right' and 'reasonable' is therefore essential in these common situations of moral ambiguity, when competing principles and interests are invoked convincingly. The overarching concept employed in this study focuses on such situations. It is a largely procedural notion, that of justice as *the balanced settlement of conflicting claims*.

This notion recognises that the substantial meaning of justice and fairness is a complex matter, especially in real international encounters, and that it is frequently contested for good reasons. It appreciates that justice cannot be defined precisely at a general level nor be reduced to a single formula or checklist. In order to understand what 'a balanced settlement of conflicting claims' means more concretely, it is necessary to examine specific situations. We might say that fairness is achieved when this notion is applied to particular cases in a manner which takes into account the relevant contextual details.[13] These include each party's entitlement to the resource or contribution to the problem under negotiation (to the extent that this can be determined), its capacity to bear costs or forego benefits associated with a joint agreement, and any established norms for resolving conflicts in that particular issue area. What is a fair solution in one instance may be regarded as deeply unfair in another, if the normative context or the resources and contributions of the parties are different. The overarching concept here proposed consists nonetheless of certain basic ingredients. These are largely procedural principles which do not assign a particular substantial content to justice or fairness. Subsequent chapters will demonstrate that they conform well with how international negotiators themselves define and operationalise these values.

The primary ingredient is *impartiality*, which draws on Barry's theory discussed earlier. It develops the concept of impartiality by examining its many dimensions in the context of real complex negotiations, and by specifying further what makes an arrangement impossible to reject reasonably. As Barry argues, a settlement of conflicting claims which cannot be agreed freely is indeed unlikely to be just. However, voluntary agreement and the absence of coercion

[13] An outcome may be just in the sense of being based on a general principle, but unfair in how the principle has been applied. An agreement may also be fair to a particular group of parties, but unjust in a wider (e.g., international) sense.

are not sufficient criteria. What justice and impartiality entail moreover is *balancing different principles and interests*. Young (1994) puts forward a similar notion with respect to the allocation of public resources and burdens; for example, military duty, the siting of hazardous waste dumps, and organs for transplantation. He holds that 'equity' consists of balancing the principles of need, desert and social utility and that, as already mentioned, major theories of justice fail to capture the nuances surrounding this reality. For example, the US national formula for distributing kidneys among transplant patients balances the principles of efficiency (likelihood of a transplant succeeding), need (urgency of a transplant), compensation for disadvantages (medical ability to accept only a small number of kidneys) and seniority (amount of time spent waiting for a transplant) (Young, 1994). In international affairs a different and wider range of circumstances and claims, and therefore principles, must be weighed. But the basic idea is the same, that there is an important element of justice in striking a balance between these.

One reason for this is that a single criterion can rarely take account of all pertinent factors in actual international encounters. As problems become more intricate and the parties more unequal in relevant respects, a greater number of principles, reflecting a wider range of considerations, must guide any 'balanced' solution. Related to this is the fact that, as noted, there are several competing principles which can be invoked credibly in most complex international talks. Each standard will enhance justice to some party or parties in some respect, while ignoring other considerations and perspectives. The contestability of the relevance and interpretation of almost any principle, and its limitations if applied alone, mean that other criteria deserve merit if a balanced settlement is to result. The interests and claims of all parties should be considered, but must not necessarily be reflected to the same extent in the agreed outcome. Put differently, justice does not always consist of 'splitting the difference' or finding some midpoint compromise between various claims (when this method can be used, which is difficult in conflicts over intangible or indivisible resources). When directly relevant inequalities among parties can be established clearly – for example, in entitlement to the disputed resources or in ability to bear the costs of a joint agreement – there is usually good reason to take these into account. In negotiations over problems ranging from acid rain to free trade, the principle of differentiating obligations and benefits between rich and poorer countries, so as to

address the special economic needs of the latter, has become one influential notion among others.

Subsequent case studies will show that international negotiators almost always end up balancing different principles, and thereby different claims. They associate this practice at once with justice, fairness and pragmatism: it is taken to be a reasonable way to overcome conflicting considerations and convictions, particularly when none emerges as clearly superior and salient, and as a practical way to formulate an agreement which all parties can accept as balanced and fair under the circumstances.

A third component of the notion of justice here proposed is the *obligation to honour and comply with freely negotiated agreements*. This is a well-established principle of morality and international law, although philosophical opinion and real-life regulations differ on matters such as when and how a party is entitled to break an agreement. Brian Barry argues that 'common-sense' morality upholds an obligation to comply when enough parties do so to keep the agreement effective in serving its goals, while 'utilitarianism' supports a greater obligation to comply as long as this still benefits the agreed purposes in any way (Barry, 1989b). It may in fact be justified for a party to break its commitments under a freely negotiated agreement for other reasons.[14] One example, recognised in the 1968 Nuclear Non-Proliferation Treaty (NPT), is when the basic survival or other vital interests of a signatory state are genuinely threatened.

The main point here is instead about intentional 'free-riding': if one or more parties benefit from the compliance by others, while purposefully avoiding to comply themselves in order to maximise their gains or cut costs under the agreement, the settlement of the conflicting claims is no longer balanced. In this sense, adherence to voluntary agreements is an important aspect of the notion of justice put forward here. We shall see that this conception has been very influential in some international negotiations. Another point is that the concept of justice as the balanced settlement of conflicting claims does not separate the duty to comply from the process by which an agreement was reached. It rejects the Hobbesian notion that only the post-agreement phase of implementation is subject to moral judgment, while processes of bargaining largely fall outside the domain of ethics.

The overarching concept of justice here thus involves exercising a

[14] This matter is further discussed in chapter 2.

measure of impartiality, balancing different principles and interests, and complying with freely negotiated agreements. It takes into account the interests of parties, but places constraints on the raw pursuit of self-interest. It may reflect some power inequalities between them, but does not simply mirror the prevailing balance of forces. Chapter 2 develops an analytical framework which fleshes out some more aspects of this concept.

Tactical uses of ethical arguments

Just as notions of justice and fairness may operate when negotiators do not express them verbally, explicit usage of the terms does not necessarily mean that such concepts are genuinely at play. Ethical arguments can be employed for purely tactical purposes. This means that a party advocates a particular principle which does not represent what it truly believes to be right, because this promises to bring greater gains. In this way statements about justice and fairness can serve as a cover legitimating demanding bargaining positions and permitting the pursuit of narrow self-interests, with minimal condemnation or other costs. A powerful party can avoid charges of exploiting its strength. A weaker one may take advantage of its feebleness and achieve a more favourable agreement by appealing to moral issues. It differs from the common situation in which a party's genuine conceptions are partly influenced by its own circumstances and thus overlap with, or at least do not contradict, some of its own interests. Such usages, while often pointed out or suspected in practice, have not been the subject of systematic empirical research.

The possibility of using arguments about justice and fairness tactically results from two basic realities. The first is the absence of consensus on one overarching standard which defines the content of such values, and the lack of consensus on priorities among recognised norms. For example, there is widespread international agreement on some core human rights. But there is no consensus on their significance relative to other norms concerning the use of force and coercion, national sovereignty and non-intervention in a state's internal affairs. Therefore, there are usually several conflicting principles on which an agreement can be based and still reasonably be considered legitimate. Good examples are recent negotiations over issues as diverse as Palestinian self-government and Israeli withdrawal from the occupied territories, European air pollution and climate change.

The second reality is that almost any principle can be interpreted and applied in different ways. Parties may agree on the general principles, but not on their precise meaning or requirements in a particular context. This has been a problematic feature of recent international trade and arms control talks, as we shall see. Factors such as precedent, any normative framework within which issues are negotiated, and their nature constrain what principles or interpretations can be judged reasonable, but some scope for tactical manoeuvring invariably remains.

When tactical uses of ethical arguments appear credible enough to be effective, this is precisely because most countries and the international community attach genuine worth and legitimacy to a variety of principles and norms and are sensitive to allegations about violations of these. If this was not the case, these arguments would lack tactical value. Moreover, tactical usage underlines once more the motivation of negotiators to be able to justify their positions and proposals on grounds which seem reasonable and not too self-serving, in order to arrive at a broadly supported agreement. Skilful negotiators know the power and appeal of behaviour which is, or at least appears, principled and always keep in mind the merits of their position.

One party's genuine fairness notion may also serve as a good defence of its interests, and another party may perceive this as merely strategic. Only access to the inside of a negotiator's mind would afford an unequivocal assessment of what ethical arguments are authentic. Without this privilege, careful observation can still go a long way to permit a sound judgment. Background knowledge from a variety of sources about the motivations of parties, the conduct of the negotiations, and the usage of language is fundamental. Specific attention must be paid to the coherence and consistency of advocated principles over time, their general credibility from an impartial standpoint, their compatibility (or not) with adopted positions and policies, and the nature of any affected self-interests. Purely tactical references to justice or fairness often appear too self-serving, and therefore fail to gain influence. The case studies on acid rain and international trade talks in subsequent chapters illustrate this particularly well. When successfully employed, however, they can certainly undermine the notion of justice as a balanced settlement of conflicting claims.

Overview of the study

We have noted that the scope of international negotiation has expanded to include new areas which raise ethical issues. What role justice and fairness play in the course of this activity, what motivation negotiators have (if any) to act upon such values, and what criteria are or are to be employed to judge processes of bargaining, are subject to lively debate in the literature. The purpose of this book is to investigate these and other related questions empirically instead, in the context of detailed case studies representing major areas of international negotiation. It employs an overarching concept of justice as the balanced settlement of conflicting claims which calls for a degree of impartiality, a balance between different principles and interests, and compliance with freely negotiated agreements. Subsequent chapters set out to demonstrate that arguments about justice and fairness in international negotiation are important and influential, and not simply a 'strife of interests masquerading as a contest of principles'.

Chapter 2 begins by developing an analytical framework which identifies the stages at which issues of justice and fairness arise in international negotiations. They relate not only to the negotiation process and outcome, but emerge already when the talks are structured and continue to do so long after a formal agreement has been concluded. The notion of justice as a balanced settlement of conflicting claims and, in fact, any serious approach to justice and fairness in international bargaining, require examining all these stages. The framework is used in subsequent case studies to recognise at what level and in what sense issues or conceptions of justice and fairness did play a role. These chapters evolve around the same basic analytical questions, while also discussing matters specific to their cases and areas.

Chapter 3 examines the rich history of negotiations within the UN-ECE aimed at reducing air pollution. Here the politically controversial issues of justice and fairness have focused on the outcome – on alternative ways of distributing the costs and other burdens of regional acid rain abatement between countries. These issues have become more influential over time, especially since the late 1980s, for reasons which will persist: scientific proof of the sources and damaging effects of air pollution, monumental abatement costs combined with unequal national resources and gains to be had from emission cuts, and previous collective experiences of using uniform percentage

reductions in emissions which ignored many fairness implications. This is a case in which several conflicting principles were put forward convincingly and eventually recognised as important in providing guidelines for a solution. 'Horse-trading' among these and other concerns eventually paved the way for new important multilateral agreements, such as the 1994 Second Sulphur Protocol.

Chapter 4 moves into the global economy. It provides an analysis of the world's most significant trade talks to date: the Uruguay Round of the GATT, which lasted from 1986 to 1994 and produced agreement on greater reforms in the global trading system than any previous GATT round. Justice and fairness issues emerged at all stages, commencing already in the initial stage of agenda setting. General norms of free and fair trade guided the talks, but their exact meaning and application became subject to much controversy and intense bargaining. Disputes over the implementation of the most-favoured-nation clause and market access in the areas of agriculture and services led to stalemates which threatened the successful conclusion of the entire Uruguay Round. Broadly speaking, an emphasis on reciprocity (the reciprocation of trade-liberalising measures), balance (the consideration of the interests and concerns of all parties) and mutual gains (the design of agreements establishing a balance of benefits between countries) eventually led to an outcome which everyone could accept overall. This included preferential treatment of LDCs according to level of economic development, without which the talks could never have been successfully concluded. As mentioned the Round also witnessed a new treatment of fundamental GATT norms as negotiable items rather than automatic obligations which, according to some analysts, may undermine the international trade regime.

Chapter 5 brings us into the area of ethnic-sectarian and territorial disputes, and specifically to the Middle East. The interim talks between Israel and the Palestine Liberation Organization (PLO) under the 1993 Oslo Accords offer interesting insights into how ethical considerations can interact with sharp power inequalities. Israel's superior bargaining strength ensured that the country's security interests and notions of fairness influenced the process substantially. However, the negotiations cannot be understood merely in terms of the distribution of power between the two sides. The costs of failing to reach an agreement meant that Israeli negotiators had to concede to certain Palestinian demands and conceptions of fairness. The serious charges of injustice have emerged in the implementation phase,

owing more to developments on the ground than dissatisfaction with the terms of the interim agreements *per se*. This case challenges conventional notions that there can be no role for ethical considerations when the weak confront the strong, and that parties define negotiated agreements as just irrespective of how their power relations have influenced the terms.

Chapter 6 demonstrates that issues of justice and fairness can be important even in negotiations concerned with arms control and military security. The 1995 Conference to review and extend the NPT, the world's key mechanism for controlling the spread of nuclear weapons, raised such issues at each stage of the process. The single most important one was the matter of compliance with the original terms of the NPT. It set much of the agenda, influenced bargaining positions and proposals, and caused stalemates. The prevailing conception that parties, in this case the nuclear weapons states, must honour obligations under agreements which they have entered into determined part of the final agreement, which rebalanced rights and obligations between nuclear and non-nuclear countries. The experience of the 1995 Conference and subsequent PrepComm meetings suggest that if the selective implementation of the NPT persists nonetheless, it is likely to erode this vital regime.

Chapter 7 integrates the empirical findings across the cases by returning to the questions raised in this introduction. It discusses the circumstances and factors which motivated international negotiators to take justice and fairness considerations seriously in the four cases. Notwithstanding their great diversity and differences, some conceptions were influential in more than one case. There are also similarities in terms of how such ideas affected the overall negotiation process and outcome, and how opposing notions were tackled. The notion of justice as a balanced settlement of conflicting claims corresponds well with how international negotiators themselves defined and acted upon the concept in most cases. The chapter concludes by outlining some directions which further work on this subject may usefully take.