FOREWORD

Process and Culture in Development Negotiations: The Management of Consent

Modern international relations are carried on by a large variety of strategies and specific measures. Upon examination, all these measures or courses of action, from the most comprehensive and strategic to the most detailed and tactical, will be seen to embody elements of consent and coercion, in varying degrees and differing combinations. For purposes of historical inquiry and analysis, it may be useful to think in terms of a pole of pure consent at one end and of a pole of pure coercion or naked exercise of force at the other end, and of a continuum in between. Most specific historical acts or measures or transactions may be located somewhere in that continuum: some will be closer to the one rather than to the other pole. Only infrequently, if at all, will particular acts tend to exemplify consent or coercion with proto-typical purity.

As might be suspected, the consent–coercion continuum in the relations between sovereign politics finds some recognition in the structure of public international law. The law of treaties and other international agreements addresses issues raised by relationships exhibiting in dominant degree the element of consent freely given. The law on armed conflict, earlier called the law of war, seeks to regulate and mitigate relationships characterized by the mutual systematic and relatively extensive and prolonged applications of military force, ordinarily regarded as the most intense form of coercion. Disputes where the parties invoke much less intense forms of coercion as instruments of policy are dealt with under the rubrics of international delinquencies or torts and the international responsibility of states.

The behavior of groups other than sovereign states whether in trans-national arenas or in internal, national fields, may be seen to embody much the same use of mixed consensual and coercive strategies in the pursuit of group goals and objectives. It is no accident that internal or national law seeking to regulate such behavior presents a general structure largely parallel to that of public international law: from the law of contracts, through the law of quasi-delicts or torts, to the criminal law. Again, such behavior tends commonly to exhibit not friendly persuasion exclusively nor unmitigated threats or intimidation, but rather infinitely varying combinations of consensual and coercive elements. The element of coercion may at times be implicit in the narrow range of alternatives open to one of the parties rather than articulated by words; at other times, it may be masked, sometimes subtly, sometimes not so subtly, rather than displayed nakedly. This kind of duality of aspects probably pervades most forms of human encounter and interaction, whether between groups or between individuals or between groups and individuals.

Even negotiations, which might be supposed to exemplify consent in archetypal form, may present elements of confrontation and conflict although muted and stylized. Negotiations imply the contraposition of claims and interests which are to be adjusted each to the other by agreement. Negotiation is qualitatively different from unilateral grant of a benefit and from unconditional surrender of a claim. Moreover, negotiations when viewed and conducted as a "zero-sum" game, for instance, (which Mr. Sunshine describes as the American style of "win/lose" negotiation) involve notions of "winning" and "losing," where one side's "gain" is automatically translated into the other side's "loss," and tend to stress adversarial competition rather than cooperation and consensus. The "losing" side in such negotiations might well regard itself as signing a coerced contract to be eroded by interpretation and in implementation and to be renegotiated at the earliest available opportunity.

It is with situations located nearer to the consent pole than to the coercion pole that Russell B. Sunshine concerns himself in this book. Mr. Sunshine disclaims any intent to write a scholarly treatise on the philosophical underpinnings of negotiations. What he set out to do was to distill the essence of decades of practice as a professional negotiator and as trainer *extraordinaire* of potential negotiators into a set of what he modestly calls "operational guidelines". Mr. Sunshine has not purported to discover and formulate principles of negotiations of possibly universal validity. Instead, he has focused upon officials and private sector negotiators from the less developed countries of the world, the types of problems they deal with, the practical difficulties they must labor under, and the institutional contexts and environments in which they must operate in seeking an agreement.

The focus that Mr. Sunshine has chosen for himself is vitally important and not only because the less developed countries still comprise the great bulk of the nations of our present day world. Acquisition of basic skills in negotiations understood as the generating, formulating and managing of consent is of particular importance for the poor and developing countries which, commonly, are bereft of the means of exercising economic and financial and ultimately of military pressures. At the same time, developing countries, many of which are new or relatively new states, have had no long history of negotiations with other countries or with foreign corporations. They generally lack cadres of experienced negotiators in their foreign offices, in their ministries of finance and of trade and industry, in their boards of investment, in their agencies charged with the coordination and implementation of development assistance, and in their private sectors. In the world as we know it, the making of agreements whether between governments, or between governments and international organizations whether governmental or non-governmental, or between governments and private multinational corporations, or between private foreign corporations and domestic enterprises, require particular skills which take time and continued practice to build and accumulate. Optimally, this calls for the development of professional or trained negotiators in official bureaucracies, and in the internal ranks of private companies.

The imbalance in skills and in level of information and experience which too often marks negotiating situations involving Third World governments or companies on the one hand and official or corporate representatives from developed countries on the other hand, can and does significantly affect the bargaining posture of the respective parties. It is idle chatter to pretend that it is not so. Typically, the Third World representatives lack training and experience as negotiators. They may come to the bargaining table with only casual preparation. They might not have even become aware of the potential negotiating assets or advantages or strategies open to them and unnecessarily believe themselves to be negotiating from serious weakness and may tend to behave accordingly. Pressure from one or more of their internal constituencies which may have diverse and conflicting interests may lead them to accept what they *in pectore* recognize to be a bad bargain.

Such a bargain cannot often be expected to survive very long or for its expressed term, at least not in its original shape and tenor. Impressionistic preparation for politically or financially important negotiations could also lead to failure to clarify and take account of all the substantive interests at stake and to failure to analyze, specify and "operationalize" such interests into concrete, sustainable negotiating positions or proposals. Third World negotiators may sit down with their counterparts relying, more or less consciously, on confused, romantic notions of "special" or "historic relations" or shared "fundamental interests", and feel grievously disappointed when such counterparts refuse to sacrifice their own interests and to defer to the former's claims. The resulting agreement would, once more, more probably than not be a fragile one and likely to produce more issues in the implementation phase than were resolved by the closing of the agreement itself.

While, as noted earlier, Mr. Sunshine disclaimed any intention to write a systematic treatise on the philosophy of negotiations, two of his principal emphases running through his book appear to me to be so fundamental in character as to be appropriately described as philosophical in their implications. The first relates to the concept of *process* in negotiations while the second is concerned with the implications of *cultural factors* in negotiations. This book constitutes persuasive documentation of the importance and usefulness of the twin notions of process and culture in negotiations.

The essential suggestion, as I read Mr. Sunshine, is that negotiation is most appropriately conceived of as as a *process* taking place over time and in space within the context of a particular economic, political and cultural environment. The negotiation process, so viewed, consists of a whole series of related acts and operations running from *preparation* for negotiations, through the actual *conduct* of negotiations and the execution or *closing* of the agreement negotiated, to the *implementation* of that agreement. From this point of view, negotiation may be seen to refer, not simply to the bargaining phase where concessions and counter-concessions are actively traded or rejected by the parties, but to a whole agreement-making process, a process which, most broadly considered, includes the *post*-implementation phases of evaluation: *revision* and *renegotiation*; or, alternatively, *termination*. The notion of process leads naturally to an intellectual framework in terms of which the events which negotiators deal with and respond to may be considered and analyzed with some confidence that all factors of substantial significance would be taken into account. Mr. Sunshine has in fact organized his operational guidelines around the several phases of the negotiation process and proceeds phase by phase, from preparation through conduct to closing of the resulting agreement. The *implementation* phase is of course ordinarily out of the hands of the specific officials or representatives who negotiated the agreement; but the practical problems of implementation must be intellectually anticipated and worked out and provided for in the agreement itself. Otherwise, the negotiators are likely to produce a dead-letter agreement, largely unworkable or non-sustainable. In this very real sense, implementation is integral with the negotiation process.

Identifying the parties to impending negotiations is the initial task and it is a task of some complexity. The parties would initially consist of those who are *formally* to execute and be bound by the resulting agreement. There are, however, others who will be *effectively* participating in the negotiations even though they may not be signatories to any ensuing agreement, and even though they may not have been physically present or represented at the negotiating table. The important concept is that of effective participation and under this concept "parties" would embrace all entities and authorities whose cooperation and approval is necessary for closing or concluding and implementing the agreement reached, and those whose interests will in fact be affected and must be taken into account in hammering out the actual shape of the agreement, in paper and in practice. We refer here to what Mr. Sunshine has described as the constituents of the respective negotiators. Frequently, internal negotiations among the constitutents of one negotiator (or negotiating team) will have preceded (or may be proceeding simultaneously with) actual negotiations across the table.

The detailed objectives or goals of parties to a negotiation may be characterized in many different ways. Mr. Sunshine offers a way of describing these goals that is general and evocative as well as useful. He refers to the functions of negotiations as threefold: deal-making; resolving disputes; and policy making. Rearranging this listing slightly, deal-making may be seen to relate to particular transactions at hand—e.g., the supply, construction and commissioning, on a turn-key basis, of a chemical fertilizer plant. In contrast, policy making refers to agreements which seek to regulate and promote future transactions—e.g., a bilateral trade and investment agreement. Past transactions, upon the other hand, are the stuff with which agreements resolving disputes are concerned. Negotiation, it will be recalled, is described in textbooks as a mode of dispute resolution not involving the intervention of a third party whether that third party be a mediator, a conciliator, an arbitrator or a regular judge. Transactions, present, past or future, where one of the parties is a government, or a government-owned corporation, or a private enterprise based in a developing country, comprise the subject matter of the negotiations with which Mr. Sunshine is concerned in this book. His concept of international development negotiations is thus clearly a spacious one. The operational guidelines he offers are accordingly applicable not only in respect of that large category commonly called international business transactions; they are quite generic in nature and equally useful in all kinds of international development transactions.

Mr. Sunshine several times underscores that preparation is an international development negotiator's single most important responsibility. For Third World negotiators, preparation for negotiation is also typically the most complex and demanding phase of the whole process. At this phase, the negotiator must rely upon the existing resources, institutions and organizational framework which make up the context within which he must function. This context in many developing countries tends to be marked by a relatively low level of available resources and of efficiency and coordination.There are many tasks to be performed during this phase but perhaps none are more fundamental than the formulation and specification and validation of the goals of the negotiations contemplated. The formulation of those goals requires the negotiator to become very clear not only as to the subject matter of the negotiations but also as to what basic interests must be secured and enhanced by the agreement to be negotiated. The negotiator must be able to ascertain his constituencies and to recognize and pose the issues of policy, whether of business, politics or law that entering into the contemplated agreement will raise for those constituencies given their own interests and goals. The specification task involves the translation of broad goals or interests into detailed positions, with supporting arguments, in respect of the issues identified. Some of those positions may be negotiable; others might not. A related equally important aspect of this task is thus the determination of the ripeness of the issues to be addressed, expressly or impliedly, during the negotiations. If the basic positions of the parties to the proposed negotiations have not been sufficiently considered and firmed up, or are either in fact non-negotiable or, though negotiable are too far apart, the issues raised are not ripe for negotiation. There would then be little point in scheduling negotiations and running heavy risks of having to break them off or accepting a bad bargain to avoid a record of failure for the negotiators and for their principals. Clearly, the tasks of formulating and specifying a negotiator's goals go well beyond passively awaiting written instructions from one's formal superiors, which may be quite inadequate, or never come, or come just before the contending negotiators sit down at the bargaining table. Developing country negotiators need to take an active role in clarifying those goals, and in making sure that the tasks of formulating and specifying the goals they are expected to realize are in fact undertaken adequately and seasonably.

Where the negotiator's principals and their basic interests have been identified and specified into practicable, documented positions on issues ripe for negotiations, the next step Mr. Sunshine stresses is that of validating those positions by securing the necessary approvals and a firm supporting consensus from one's constituencies. There is nothing more distressing to a negotiator than suddenly finding, in the midst of actual bargaining, that that consensus has evaporated and in effect his mandate along with it. If this happens, the negotiator will not only lose face: his principals may well be perceived by the other side as having failed to negotiate seriously or in good faith, with unpredictable consequences.

It is of course not enough to prepare one's own positions on the issues to be negotiated. One must also systematically anticipate and analyze the other party's goals and interests, his strategies and possible detailed moves and responses, and the rationalizations with which they will be presented and defended. Further, a negotiator will have to prepare his own moves and arguments to counter his counterpart's expected positions and reactions to the former's opening presentation. The ability to anticipate the other party's thinking and moves and the inventiveness to shape responses likely to find at least partial acceptance by the other party, will come with experience and the professional development of negotiators.

A second major emphasis of Mr. Sunshine in this book is on the relevance of cultural factors in negotiations. That group culture influences and conditions the thinking and behavior of members of that group is an insight that the modern social sciences offered a long time ago; it is an insight that is not, however, frequently brought to the negotiating table.

The relevance of culture for negotiations, most generally put, lies principally in the fact that the culture of the community in which each negotiator lives and functions affects the shaping of his own goals and positions and negotiating style. At the same time, culture influences the perception of each negotiator of the negotiation goals and positions and style of his counterpart across the table. Cultural influences are of course so pervasive and continuous and encompassing in their operation that, most of the time, we are not even conscious of their workings. Thus, one basic guideline Mr. Sunshine puts forward is that negotiators need to become personally aware of and to recognize and understand the cultural bases of their own negotiating positions and strategies and, more importantly, those of their counterparts.

In my view, the basic contribution of Mr. Sunshine in this respect lies in the detailed examination of the ways in which cultural factors tend to affect the behavior of the negotiators in the preparation and actual conduct phases of negotiations and in responding to major aspects of a negotiation situation. Taking certain general characteristics commonly associated with Americans on the one hand and Japanese on the other, he has constructed two generalized models of the kinds of responses or behavior which may be expected from American and from Japanese negotiators in respect of an 18-item listing of important aspects of a typical international development negotiation. The choice of American and Japanese negotiating behavior models may perhaps be explained not only in terms of the current sourcing of major flows of development capital and technology to the developing countries but also in terms of the relatively sharp differences observable between American and Japanese cultures. Where national cultural traits may be less sharply defined—for instance, Japanese vis-a-vis Korean—it would probably be more difficult to construct comparable models of the consequences of culture for negotiating behavior. Nonetheless, from the viewpoint of developing countries, it would be useful to find out if similar models of typical behavior of French, German, Italian, Indian, Korean, Swiss, Taiwanese and so forth, negotiators can be constructed with scientific care from empirically valid data showing appreciable differences. Such models, should they become available, might serve as shorthand indicators of the kind of negotiating behavior one may expect from a foreign counterpart and prepare to meet. The task of producing such models cannot realistically be assumed by the negotiators themselves; negotiators whether from the Third World or not, cannot be expected to be cultural anthropologists as well. Where no detailed and documented models or profiles of particular national negotiating styles are available, the conscientious negotiator preparing himself for his tasks would simply have to try to inform himself by normal research methods on the general history and culture of the nation from which his counterpart comes. He can then seek to follow the restrained and commonsensical injunctions of Mr. Sunshine to be constantly aware of the possible operation of cultural factors both upon one's self and upon the opposing negotiator, to explicitly consider and anticipate the implications of the known cultural traits of the other side during the preparation phase of negotiations, to avoid judging the behavior of one's negotiating opponent in terms of one's own cultural values and predispositions and so forth.

It is of course possible to overstate the impact of culture on negotiations. For one thing, such impact is perhaps likely to be more significant in respect of negotiating behavior than in respect of substantive negotiating positions, certainly where the subject matter of the negotiations is technical or financial in nature, the supply and construction of a copper smelter and refinery, for instance, or a syndicated loan agreement or a debt-for-equity swap agreement. For another, the influence of cultural factors even upon negotiating behavior tend to be diluted where the other party is a consortium of companies from different countries and represented by a negotiating team composed of representatives of the component companies. The cultural traits of typical Japanese negotiators identified by Mr. Sunshine are likely to be substantially muted where the consortium includes not only a Japanese company but also for example, Belgian and Spanish companies, even if the spokesman of the consortium team is the Japanese negotiator. Another factor which may mitigate the impact of national culture on negotiating behavior is the possible professionalization of negotiators. Should negotiators develop into a separate professional group, whose members are recruited from different countries and whose services become readily available internationally, a distinctive body of professional behavior and ethos may emerge which should moderate culturally-based differences in negotiating conduct. But none of these speculations diminishes the relevance or the utility of the set of guidelines and suggestions that Mr. Sunshine has put together for trans-cultural negotiations by Third World representatives.

Frequently Third World negotiators lack confidence in their ability to deal effectively and successfully with developed-country negotiators across the table. If the projection of policy and the resolution of disputes across as well as within state boundaries by consensual rather than by coercive means is important, if the creation of new wealth and the distribution or redistribution of resources through agreement-making procedures rather than through official impositions is important, then raising the level of confidence of developing-country negotiators in their own capabilities is important. That increase of confidence should come when the negotiators learn how to prepare themselves for serious and hard bargaining, when they build up and accumulate experience and learn from it, when, above all, they come to understand that negotiating skills—intellectual analysis, disciplined emotions and behavior, ability to communicate lucidly and persuasively, willingness to listen to and enter the mind of one's counterpart, high commitment to plain hard work—can be acquired and developed and are not the automatic function of level of technology or racial endowment or cultural environment.

In this task of building up levels of confidence and of negotiating skills, the negotiator's manual that Mr. Sunshine has given us is a powerful instrument. I command it to every lawyer, whether from the governmental or the private sector, who must reach a deal with another party or who must generate consensus to support some projected policy or who must resolve an existing conflict. Best of all, it is not necessary to be a Third World negotiator to appreciate it and to profit from it. Mr. Sunshine has a lot to say even to professional negotiators from the developed portions of the world. Some years ago I asked the author of a well advertised handbook on negotiations who had made a lucrative career out of summarizing his book in high-priced seminars in various countries, what would happen if I and my counterpart had both read his handbook and followed his advice. The author declined to answer the question. When raised in respect of Mr. Sunshine's book, the obvious answer will be that my opponent and I would be more effective negotiators for having done so and that a mutually satisfactory and durable agreement should be the more easily reached.

FIORENTINO P. FELICIANO

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