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THE PROCESS AND OUTCOME OF NEGOTIATIONS WITH MULTINATIONAL CORPORATIONS: A CONCEPTUAL FRAMEWORK FOR ANALYSIS

by

T.M. OCRAN*

I. INTRODUCTION

Studies on negotiations as a subject tend to fall into four basic types. One category centers on the analysis of issues or topics that feature most often in the sphere of activity covered by the particular area of negotiations; the aim being to deepen technical knowledge of those subjects and thereby increase the negotiating capacity of prospective negotiators.

In the specific area of multinational corporations (MNC's), the technical issues often raised in the investment negotiation process would include the tax systems of both home and host states of the investment; methods of project appraisal, aimed at ascertaining the viability of the project and ensuring more favorable economic and social rates of return; transfer pricing and other restrictive business practices; the corporate structure of the project and its implications for corporate policy-making, financing and management; financial arrangements, including foreign exchange regulations; transfer of technology, employment and labor relations; and problems of the applicable law and machinery for the settlement of disputes.¹

A second category of studies consists of historical studies of particular negotiations which essentially seek to describe the process and outcome of those negotiations, with little attempt at formulating general propositions that can be used to explain or predict other negotiations.²

A third category seeks to identify or outline background factors affecting the relative bargaining position of the parties and thereby shaping the structure of the distribution of gains arising from the common enterprise.³ One ap-

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¹See D.N. SMITH & L.T. WELLS, *NEGOTIATING THIRD-WORLD MINERAL AGREEMENTS* (1975); UNCTC, *Strengthening the Negotiating Capacity of Developing Countries* (March 23, 1979); UNECA, *TNC's and the Excessive Outflow of Financial Resources from Developing African Countries* (Working Paper No. 3, 1979); UNECA, *The Impact of TNC's in the Aluminum Industry in Ghana* (Working Paper No. 4, 1979); UNECA, *Activities of TNC's in the Cocoa Industry in Ghana* (Working Paper No. 5, 1979); UNECA, *Production and Marketing of Coffee in Burundi* (Working Paper No. 6, 1979); UNECA, *Report on Transnational Corporations Activity in the Bauxite Industry of Sierra Leone* (Working Paper No. 7, 1979); UNECA, *TNC's in the Copper Industry in Zaire* (Working Paper No. 9, 1979); UNECA, *TNC's and Primary Commodities in Africa* (Working Paper No. 10, 1979).

²See J. FAYERWEATHER & A. KAPOOR, *STRATEGY AND NEGOTIATIONS FOR THE INTERNATIONAL CORPORATION* (1976); S. ALLARD, *RUSSIA AND THE AUSTRIAN STATE TREATY* (1970); R.J. TERCHEK, *THE MAKING OF THE TEST BAN TREATY* (1970); N. BALOBKINS, *WEST GERMAN REPARATIONS TO ISRAEL* (1971).

³See Z. MIKDASHI, *THE INTERNATIONAL POLITICS OF NATURAL RESOURCES* (1976); I.W. ZARTMAN (ED.), *THE POLITICS OF TRADE NEGOTIATIONS BETWEEN AFRICAN AND EUROPEAN ECONOMIC COMMUNITY* (1971).

proach within this category involves attempts at postulating some general propositions or hypotheses for analyzing or explaining the outcome of negotiations in general, based on empirical evidence gathered from specific areas of bargaining, such as corporate mergers and other take-overs, labor-management disputes, and international political crises. This approach is not primarily concerned with the building of models; and such theoretical discussions as take place are essentially intended to construct a system of general concepts of describing negotiations.⁴

Another subset within this category is the completely deductive approach which finds expression in model building,⁵ in which some kind of prediction of results of negotiations is constructed from a set of behavioral assumptions — either those generally reflecting properties that are intuitively regarded as fair or equitable, or assumptions about human behavior that are meant to conform to some concept of rationality, in particular as this term is understood in conventional economic theory.⁶ Most of these works are highly mathematical in their language and constructed with the aim of either using computers to investigate bargaining games or relying on relatively less complicated analytical procedures.⁷ Indeed, there have been so many of such models that some writers have already constructed a taxonomy of bargaining models.⁸

Then there is the fourth category of studies, which is simply directed at a knowledge of negotiating style and techniques, and tends towards behavioristic analyses and considerations.⁹

This paper has little in common with the levels of abstraction and sophistication of the model building approach within the third category of negotiation studies. The basic problem with such models based on rational

⁴See A. LALL, *MODERN INTERNATIONAL NEGOTIATION* (1966); O. YOUNG, *THE POLITICS OF FORCE: BARGAINING DURING INTERNATIONAL CRISES* (1968).

⁵A theoretical model is essentially a mental construct that seeks to explain a phenomenon — the workings of a system, a process, etc. — by establishing the logical or conceptual relationship between the variables involved. It provides the outlines around which we assemble descriptive information, and it serves a basically heuristic purpose. M. BLACK, *MODELS AND METAPHORS: STUDIES IN LANGUAGE AND PHILOSOPHY* 228 (1962).

⁶Rationality in this context means that one's behavior is governed by extensive and explicit thought processes of an intelligent and purposive individual. Rationality implies that the parties are logical in their reasoning, that they can state their preference for possible outcomes according to certain criteria, and that they consider consequences of all alternative courses of action.

⁷See generally *BARGAINING: FORMAL THEORIES OF NEGOTIATION* (O. Young ed. 1975); J. CROSS, *THE ECONOMICS OF BARGAINING* (1969), A. CODDINGTON, *THEORIES OF THE BARGAINING PROCESS* (1968); T. SCHELLING, *THE STRATEGY OF CONFLICT* (1960); J. VON NEUMANN & O. MORGENSTEIN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR*; I. STAHL, *BARGAINING THEORY* (1972); J.F. Nash, *The Bargaining Problem*, *ECONOMETRICA* XXI (1953), pp. 128-140; J.C. Harsanyi, *Approaches to the Bargaining Problem Before and After the Theory of Games*, *ECONOMETRICA* XXIV (1956), pp. 144-157.

⁸STAHL, *supra* note 7, at 213-52.

⁹See G. KENNEDY, *MANAGING NEGOTIATIONS* (1980); C. KARRASS, *THE NEGOTIATING GAME* (1970); W. MINNICK, *THE ART OF PERSUASION* (1968); C. LIPTON, *GOVERNMENT NEGOTIATING TECHNIQUES AND STRATEGIES*, Background Paper No. 3, WORKSHOP ON MINING LEGISLATION AND MINERAL RESOURCES AGREEMENTS (1978).

behavior is the extent to which people actually behave, or can be made to behave, in a rational manner when negotiating. The theorists themselves admit that the behavioral assumptions involved in the construction of their models cannot be controlled in any experimental replication of the negotiating situation. Many of these models cannot as yet be made operationalized. Moreover, the models' assumption of complete preference ordering is often criticized on the grounds that people are frequently unable or unwilling to state or explicitly contemplate preferences over two widely different outcomes. Nonetheless, the models based on rationality are valuable in their own right, in that by seeking to predict the outcome of negotiations, a rational theory becomes a useful guide for empirical research. On the other hand, the first category of studies, which focuses on substantive analyses of negotiating issues or of sectors, is so fundamental to the acquisition of negotiating skills that it is best treated separately on a topic-by-topic basis.

The essential purpose of this paper is to provide a conceptual framework for case studies aimed at outlining the main stages in the process of negotiations; indicating some of the main factors affecting the relative bargaining position of the parties to negotiations with multinational corporations; and providing indices for evaluating the resulting structure of the distribution of gains from the projects contemplated by such negotiations. The paper thus combines elements from the second, third and fourth categories of studies on negotiations.

II. NEGOTIATIONS AND CONFLICT RESOLUTION

A. *The Concept of Negotiations*

Negotiations may be described as a process through which two or more parties — be they individuals, groups or larger social units such as nations — interact in developing potential agreements out of divergent view points, so as to provide guidance and regulation of their future behavior.¹⁰

This characterization of negotiations holds notwithstanding the fact that the underlying purpose of a particular negotiation may not be agreement at all, but rather delay or propaganda. Delay forestalls action while one awaits more favorable circumstances; and propaganda seeks to embarrass the other party, promote positions that public opinion would favor, or to simply avoid the onus of failing to negotiate. Other discernible functions of negotiation are the maintenance of contact, deception of the other party, and intelligence gathering.¹¹ We are here concerned with negotiations aimed at an outcome, for example, with those situations involving serious efforts towards agreement. This may be termed negotiating in good faith.

¹⁰J. Sawyer & H. Guetzkow, *Bargaining and Negotiation in International Relations*, in INTERNATIONAL BEHAVIOR 466 (H. Kelman ed. 1965); ZARTMAN, *supra* note 3, at 202.

¹¹SAWYER & GUETZKOW, *supra* note 10, at 468.

There is a tendency to use "negotiation" and "bargaining" synonymously. Strictly speaking, however, negotiation is a wider concept than bargaining. It covers both the processes that take place prior to bargaining, during which the rules of the latter are established, including such steps as consultation and dialogues; as well as the bargaining process itself. Bargaining, on the other hand, more accurately refers to the actual "process of demand formation and revision which provides the basic mechanism whereby the parties converge towards an agreement."¹² Negotiation thus refers to the whole situation within which bargaining occurs. Nonetheless, there are aspects of negotiations, such as negotiating style and techniques, in which the emphasis is appropriately put on the bargaining process, and where it seems justifiable to equate negotiations with bargaining.

B. *Resort to Negotiations*

The above characterization of negotiations assumes the existence of conflict or disagreement between the parties, which is expected to be resolved through negotiations.

A conflict arises when two or more people or groups endeavor to pursue goals which appear to be mutually inconsistent.¹³ To say that the parties are in conflict is not to suggest that this conflict necessarily concerns their total relationship. If parties differ on an issue, it does not follow that they have no over-all or common interest; and negotiations permit these specific conflicts to be resolved without the over-all relationship between them being jeopardized.

Where two parties are in conflict there are a number of attitudes they may adopt. They can, for example, decide to ignore the issue and agree to disagree. But there are costs in disagreeing; and in business relationships, agreeing to disagree does not help much. The parties may therefore decide to resolve their conflict through a number of channels.

Conflict resolution, then, is the process by which the parties reconcile their goals to the extent that they are mutually consistent. The conflict is deemed to be resolved when the two parties are willing to accept a given position, either because the costs of inducing further conflict would outweigh the benefits of any improved settlement which may result, or because on some other criterion, they are willing to accept the settlement as fair.¹⁴ Conflict resolution does not, however, mean conflict elimination; and the maintenance of conflict may sometimes be a good thing. Competition between firms, for example, or indeed between any forms of organization is often regarded as

¹²CROSS, *supra* note 7, at 7.

¹³M.B. Nicholson, *The Resolution of Conflict*, in BARGAINING: FORMAL THEORIES OF NEGOTIATION 201 (O. Young ed. 1975).

¹⁴NICHOLSON, *supra* note 13, at 232.

beneficial because it enhances efficiency. The point, then, is to devise ways of improving the means for conflict resolution so as to avoid serious costs.

The process of conflict resolution covers a whole range of activities which include at one end, dialogue between the parties; at the other extreme, violent warfare in the case of states and other political groupings. Negotiation falls somewhere in between these two extremes, but it is by no means the only form of peaceful conflict resolution.¹⁵ For one thing, the resolution can be dictated by one party to another; and if that second party accepts the right or the might of the other party to decide matters unilaterally, then negotiation has no place in their relationship. Again, one party may simply succeed in persuading the other to accept his point of view, with no costs and no *quid pro quo* to himself. However, persuasion in isolation seldom achieves success, and is usually encountered as an integral part of the negotiating process.

There is also the possibility of dispute-settlement through court litigation; and this is not really negotiation, because the procedure is laid down and the solution of the conflict determined by the court must then be accepted by the parties. Similarly, the settlement of a dispute by arbitration is not negotiation, even though the disputants agree initially to plead their cases before the arbitrator. Here a third party is empowered to make a binding decision for the parties, whether they like it or not. Similarly, the resolution of conflict by chance methods such as tossing a coin is not negotiation. On the other hand, there is the method of mediation, where a third party simply uses his services to help in the process of bargaining but does not set up an actual conflict resolution procedure. This may be regarded as part of the negotiating process.

Notwithstanding the fact that negotiation is not the only method of conflict resolution, it is still one of the most commonly used because of the peculiar circumstances in which the parties often find themselves.

All types of negotiations have one thing in common: the parties involved have varying degrees of power, but not absolute power, over each other to force a decision. In circumstances where one person has total control over another, it may indeed be tempting to dispense with negotiations. In other circumstances, the outcome of the conflict is such that it does not depend on one party alone and calls for interdependent decision-making through negotiations. Oran Young refers to this necessary interdependence as "strategic interaction," that is regarded as central to all situations involving bargaining.¹⁶ Secondly, negotiations are more likely where there is a balance of advantage between the costs of agreeing and disagreeing; that is, as long as both parties consider that the benefits of resolving the conflict through negotiations are greater than the

¹⁵KENNEDY, *supra* note 9, at 4-6.

¹⁶Young describes strategic interaction as "the set of behaviour [sic] patterns manifested by individuals whose choices are interdependent, in the sense that the outcomes associated with their choices are partially controlled by each other." YOUNG, *supra* note 7, at 6.

likely benefits of resolving it through some other means.¹⁷ If the evaluation of prospective outcomes is favorable, negotiation will generally ensue. Thirdly, for negotiations to succeed the parties must be willing to move from stated positions and manifest the will to negotiate in spite of the difficulties. It follows that a unilateral recitation of requests, complaints and charges is not negotiation, but only a presentation of petitions.

C. *Bargaining Objectives*

We have asserted that negotiations basically arise because the parties perceive a potential pay-off or gain which they will gain only by reaching an agreement among themselves. If a party were convinced that he could manage on his own resources or through another arrangement to obtain a pay-off higher or better than that suggested by the proposed agreement, he would probably not enter into negotiations at all; or would seek ways of breaking them off if he has already entered into them. Yet, although the sum of goods or values expected to be brought into being by agreement is assumed to be larger than the amount available to a party beforehand, it is also reasonable to assume that the positive sum is not large enough to cover the wants of both parties.

Hence the objective of each party in actual negotiations is to maximize his gains from the over-all pay-off at the expense of the other. Negotiations may thus be viewed as the pursuit of the twin and often contradictory goals of maximizing one's own pay-off and reaching a group agreement or as a process through which the various individual interests are gradually transformed into one group interest within the framework of an agreement.¹⁸ The concept of gains requires some elaboration. It refers to all the positive effects of the venture excluding its negative externalities. Financial gains cover one aspect and refer to the quantum of revenue from the project, including foreign exchange proceeds, taking into account their absolute size or value, and costs incurred by the domestic economy in earning them. And the distribution of gains describes the structure or formula by which the gains from the project are eventually divided among the interested parties.

D. *How Negotiations with MNC's Arise*

There are three basic ways in which host countries initially assume legal obligations leading to the establishment of a MNC project within its borders. The host state may become a party to a specific agreement arising out of negotiations in respect of a particular project and tailored for that project. An example would be a fairly detailed agreement covering various phases of a mining venture — mining, processing, marketing etc.. This option is often the result of perceived inadequacies of the general laws dealing with all requisite

¹⁷KENNEDY. *supra* note 9, at 3-10; SAWYER & GUETZKOW. *supra* note 10, at 473.

¹⁸THE STRUCTURE OF CONFLICT (P. Swingle ed. 1970).

aspects of foreign investment in the country. On the other hand, the state may simply assume obligations under a standard agreement whereby the procedures have been standardized in respect of all undertakings falling within its sphere, and hence raises no real need for formal negotiations. A forestry or mining prospecting concession falls into this category. Thirdly, the state may assume obligations arising from the operations of the general laws applicable to foreign investment project operating under a statute embodying generally applicable fiscal incentives.

It is the first type of situation that calls into play the full force of negotiations. The main advantage in this approach of case by case negotiations leading to specific contracts is the recognition that each project may be sufficiently distinct from others to warrant individual treatment. Moreover, the built-in flexibility of negotiations makes it possible for the host government to strike a bargain by taking into consideration such constantly changing variables as technological advances, volume of world production, and market conditions of the particular commodity.

Generally, renegotiations are warranted if there has been a fundamental change of circumstances; as, for example, where the fundamental economic basis of the agreement has dramatically altered in view of current world market prices and other relevant economic indicators (“*clausula rebus sic stantibus*”). The constantly changing world economic situation explains the current attitude of many host states to press for the insertion of renegotiation clauses in the original agreement. Protracted persuasions on the MNC to negotiate become unnecessary if renegotiation clauses had previously been expressly stipulated.¹⁹

Such clauses may apply to only specific areas or topics in the agreement; or they may affect the entire substance thereof, as for example, when it is stipulated that the parties would meet to consider periodically whether the agreement is operating fairly for each side, and, if not, to use their best endeavors to make requisite changes. However, the need for express renegotiation clauses may be obviated by such built-in mechanisms as a stipulation of precise formulas for periodic automatic adjustments in the financial and fiscal aspects of the agreement (“*escalation clauses*”); or the insertion of most-favored-nation clauses, the ultimate effect of which is to set in motion a renegotiation of the agreement when the requisite conditions have been satisfied, since such favorable concessions cannot be mechanically determined and applied.²⁰ On the whole, one would say that the principle of renegotiation

¹⁹There are, however, many host states which disapprove of express renegotiation clauses on the grounds that they can be unduly restrictive, since they exclude review until certain specified conditions have been met (e.g. a lapse of 5-7 years). Hence they prefer to reserve their sovereign prerogative to call for renegotiations whenever political and economic exigencies so demand.

²⁰On renegotiations of MNC agreements generally, see ASANTE, *Stability of Contractual Relations in the Transnational Investment Process*, INT'L & COMP. L.Q. 401-23 (July, 1979).

is becoming increasingly acceptable by MNC's, even if they still have reservations about express stipulations to the effect. As an MNC commits itself more and more to the resources of a given country, it seems less likely that it would refuse outright to renegotiate an agreement which turns out to be inadequate from the host country's standpoint.

On the other hand, a particular MNC may refuse to renegotiate the original agreement or renegotiations, once initiated, may break down. The host state may then resort to the third approach, namely, nationalization. Nationalization may, of course, occur without previous attempts at renegotiations. This happens when a government resorts to it as a matter of principle, or as a result of events of an ad hoc nature. But unless nationalization is confiscatory in nature, it may yet entail a certain amount of negotiations which are likely to center on such issues as the adequacy and mode of payment of compensation. It may also include negotiations on a new form of relationship between the two parties once the equity relationship is terminated, for example, the conclusion of management, technology or marketing contracts with the nationalized set-up. Hence negotiations with MNCs can arise both at the pre-establishment and post-entry stages of their operations.

III. THE BARGAINING PROCESS: PREPARATION STRATEGIES, TECHNIQUES, AND OUTCOME

Negotiations may be regarded as consisting of five aspects or clauses of variables:²¹ (a) goals (or objectives), which motivate the parties to enter and sustain the negotiation; (b) the bargaining process itself, which involves communications and actions leading to (c) certain outcomes or results for each party; all occurring within and influenced by (d) pre-existing background factors of traditions and relations between the parties; and (e) specific situational conditions under which the bargaining is conducted. Goals and the background factors are antecedent to the bargaining process; that process and the situational conditions are concurrent; and the outcome is consequent thereon.

The bargaining process thus describes the actual process by which the terms and conditions of a potential agreement, including the structure of distribution of gains, are arrived at.

There is thus a sequence of activities in the bargaining process, including:

- (i) preliminary negotiation concerning procedure and agenda;
- (ii) formulation of alternative positions and priorities in goals.
- (iii) communication and persuasion intended to alter the other party's perception of the situation.²²
- (iv) outcome or results of the bargaining.

²¹SAWYER & GUETZKOW. *supra* note 10, at 467.

²²*Id.* at 472.

“Bargaining strategy” is the game plan a party uses to achieve his objectives in negotiations; “techniques” are the individual elements of that strategy; and “tactics” (or gambits) point to the maneuvers that make up those techniques.²³ We shall proceed to discuss these stages, strategies and techniques in greater detail.

A. *Preparation*

Preparation for negotiations consists of what the parties have to do before arriving at the bargaining table. The amount of time a party puts into preparation goes a long way in determining his relative bargaining strength, and preparation is the most consistent guide to negotiating performance. A badly prepared negotiator can only react to events; he cannot take the initiative. Yet all too frequently, government officials do not make adequate preparations for negotiations with MNC's.

1. Feasibility Studies

One cannot overemphasize the importance of feasibility studies, wherever appropriate, prior to bargaining. Such a study should properly form the basis for any fiscal regime to be negotiated for the intended project. Where, as sometimes happens, the feasibility study is prepared not before, but after the conclusion of a long-term contract, this means that the host government has determined the elements of the fiscal regime (price of the commodity in question, tax, royalty etc.) even before it is in a position to assess the economic prospects of the resource to be exploited, or even the size of the resource in the case of mineral deposits. Undue advantage is thereby given to the foreign investor.

2. Setting Priorities in Objectives

On each issue for negotiations, a party may have a set of alternative positions ranging from the position least acceptable to him (the “threshold position”) to that most favorable to him. He would be most lucky to find himself in a situation in which the other party simply accepts the alternative that he likes the most. Indeed, quite often he will not succeed in having the most favorable alternative accepted, however much he may insist on it. Typically the alternative that is ultimately accepted would lie somewhere along the line, i.e. a compromise solution, or an agreement on an alternative which is neither the best nor the worst for either party. The settlement can be reached anywhere within “the bargaining area” (the area between a party's most favored position and his break-point). The final position adopted is defined by the relative strength of the parties and by the general background negotiating factors. The art of negotiation, therefore, is to obtain one's own objectives to the maximum extent possible and to compromise in those areas

²³KENNEDY. *supra* note 9, at 142.

which are of least importance to one's side.²⁴ There will be areas which will be of such importance that one party cannot compromise, and other areas in which there is considerable room for compromise.

Hence, governments should approach negotiations with MNC's with a thorough understanding of their own interests and those of the other side. They should also determine the over-all objectives of the negotiation and decide how important each issue is to the government. These can then be ordered as a set of priorities.²⁵

Among the objectives, there are those which a particular party feels he must achieve; and others which he would like to achieve. By definition, the latter objectives are less basic than the former. They are such that if the party has to abandon them in order to achieve or protect the "must" objectives, he would do so willingly.²⁶ One consequence of the failure to establish clear priorities is that negotiations may start with insistence on minor issues, leading subsequently to a softening on more important points so as not to appear obstructive. The establishment of a set of priorities means that one should develop a number of fall-back positions as part of the preparation for negotiations.

3. Collecting Information on Other Party

Oran Young has defined information as knowledge about all those factors which affect the ability of an individual to make choices in a given situation in such a way as to maximize his utility.²⁷ Gathering intelligence about the other party is basic to whatever issue one is negotiating, and it plays a vital part in outlining one's own objectives. In all the processes of negotiations, information concerning the weight or value the other party places upon the various possible outcomes is crucial. Governments should therefore exert every effort to obtain information on the terms and conditions of comparable agreements entered into by the investor with other governments.

There is often an imbalance of information between governments and MNC's in that the latter invariably have more detailed and accurate cost and revenue information about projects, and are also in a better position to make realistic estimates and projections. This in turn often arises from the fact that the MNC's have a greater understanding of the particular industry and the market forces at work. At any rate, there seems to be a built-in problem of obtaining complete information on the other party to any negotiations. As each party seeks to induce the other to go a little down his list of alternative objec-

²⁴LIPTON, *supra* note 9, at 1.

²⁵Unfortunately, in many kinds of negotiations it is not always easy for the parties to know exactly what they want before-hand. Sometimes the brief of the negotiating agents merely requires them to "get what they can," and this may only become defined when the negotiations are already under way.

²⁶KENNEDY, *supra* note 9, at 29-31.

²⁷YOUNG, *supra* note 7, at 10.

tives in order to maximize his gains, it becomes the aim of both parties to control each other's knowledge of their list of alternatives. Hence we should assume that there would be imperfect information on the other party in negotiations. Moreover, the desire for maximum information is always hamstrung by considerations of the high cost of processing it into relevant information. Nonetheless, it is important to know all that can be known about the other party; and also to ensure that the other party knows at the appropriate time what the first party knows about him.

4. Drafting The Proposed Agreement

Each side in negotiations attempts to seize the initiative and to make its proposals the basis for discussions. It is important that the government negotiates on its own grounds and that it does not lose control over the process. Here the government party, as representatives of the government, has an inherent advantage.

Governments have sought to frame the negotiating issues by attempting to provide the first drafts of the agreement themselves. A draft agreement reflects the basic points of view of the party who prepared it. Thus, that party sets the terms around which bargaining begins. Hence, the danger in allowing the MNC to present the initial draft document is that the government may find it difficult to negotiate away from the general framework and from a large number of specific provisions reflecting the MNC's point of view.²⁸ Yet the scarcity of personnel in host countries with the requisite skills, and the time required to prepare a useful draft, has led many governments to permit the MNC to submit the draft provisions serving as the basis for negotiation.

Since it seems logically sound at the bargaining table to agree on general propositions of the agreement before proceeding to specific ones, some draftsmen prefer the practice of using "heads of agreement" to embody a statement of the agreed principles before working on detailed annexes. However, there is no intrinsic virtue in this approach, or for that matter in a short or long draft. The extent of the detail in an agreement is a function of the practice of individual governments and foreign investors. The main objective in drafting is to spell out the agreement reached in sufficient detail so that it is clearly understood and as many potential points of misunderstanding are eliminated as is possible. For this reason, it is also important that as few experts as possible do the actual drafting of the document.²⁹

In some cases, the government negotiators combine the production of the first draft agreement with opening the project for general bidding, where appropriate, and using the best offer as the basis for negotiations. Indeed, this

²⁸SMITH & WELLS. *supra* note 1, at 156-57.

²⁹Someone once said that the best drafting committee is a committee of one: the old adage that "a camel is a horse designed by a committee" is quoted in support of this position.

practice has become a general policy in some countries. Where this can be done effectively — e.g. in industries not characterized by tight obligopolistic co-operation — the bargaining position of the host country can thereby be substantially strengthened.

5. Formulating the Agenda

When attention is concentrated upon the question of specifically what is to be negotiated, it is not only the draft agreement that is to be considered, but also the agenda for the bargaining table. Starting with proposals from each party for issues to be negotiated, the parties must jointly decide at the early sessions of the bargaining which matters should constitute the agenda. Since the choice is critical and influences the outcome of the negotiation itself, the government negotiators should also come up with a draft agenda for the meeting.

The importance of establishing an agenda is that it forces the parties to determine which policies, principles, problems and issues are worth the most attention. The exercise also reveals the extent to which the other side is interested in a particular issue. The agenda puts particular provisions of the draft agreement into perspective and avoids the pitfalls of the clause-by-clause approach at the bargaining table, in which points of language, punctuation and other points of minor substantive significance are treated at the expense of major issues of policy.

6. The Negotiating Team

Most governments use the team approach in negotiating agreements with MNC's. This is understandable in view of the variety of subjects which are often raised in such negotiations: e.g. the differences between cash flow and profits, the significance of depreciation in relation to profits and cash flow, the techniques of financing, and other subjects mentioned in the introductory part of this paper. It therefore becomes necessary to have experts in as many areas as possible: including financial analysis, accounting, tax, law, engineering, development economics, and administration.

Since the results of the negotiation will also affect more than one ministry or department of government, it is usual to find representatives from the different departments on the negotiating team. A few countries group together all the necessary expertise in a single state agency or ministry which has a virtual monopoly to negotiate agreements with MNCs. There are advantages in this idea of one agency as a focal point, in that everything is co-ordinated under one roof and probably simplifies the investment procedure for the prospective foreign investor. At any rate, it is always valuable to include on the negotiating team someone who will be responsible for the administration of the project after it has been established, so that he fully appreciates the history and import of the agreement. On the other hand, too many members make an unwieldy

team, and in such cases one discovers that the real negotiations take place between the team leaders and their few allies when they meet outside the bargaining room. Those entrusted with the composition of the negotiating team should therefore seek to strike an effective balance between required expertise and numbers.

In organizing the team, it is important to decide who is to speak for the government. This will normally be the leader or chairman of the team, and he in turn may designate those members of the team who are to address particular issues on the agenda. It is a useful strategy to have a parity of status between the leaders of the two negotiating teams. If the investor's representative has to report back to his president or board of directors to obtain approval, then it is essential that the government too retains the flexibility of having its team leader report back to his minister to obtain such approval.³⁰

The most effective negotiating teams tend to have certain characteristics. Their membership, no matter the composition, does not vary from negotiating session to negotiating session. Instead they have a clearly designated chairman with clearly defined powers; and they have unambiguous authority to conclude agreements subject only to executive or legislative approval.³¹ When individual ministries or other agencies are perceived as having the power to erode the authority of the negotiating team, the team often finds the foreign investor negotiating directly with those establishments concerned with particular aspects of the agreement.

One question which often crops up in the composition of the negotiating team is the role of foreign experts. Where governments perceive weaknesses in their bargaining skills, foreign consultants are often called in to assist in formulating general policy or in particular negotiations, or to suggest specific solutions to individual problems that have already been identified by the local experts. They may also be of assistance in clarifying objectives, developing a strategy for negotiation, and preparing back-up papers and fall-back positions.

A basic issue raised here is whether such foreign consultants should be used at all, considering the possibilities of conflict of loyalties as well as differences in perspectives between them and the host country on political and ideological goals. In any case, the resort to foreign experts must be seen as no more than a temporary measure, intended to bridge the gap while the training of local expertise is accelerated. Foreign consultants, if they are to be used at all, should hardly be appointed as official members of the government negotiating team. They should take the backroom position of clarifying issues and preparing position papers.

Once the team has been empanelled, it is necessary to brief them on the

³⁰LIPTON, *supra* note 9, at 4-5.

³¹SMITH & WELLS, *supra* note 1, at 166.

tasks they are to perform. We have already mentioned the role of the leader, who is to do most of the speaking and generally to lead the negotiation towards a conclusion. There must be someone on the team assigned with the task of recording the arguments of both sides and the agreement reached on particular issues. Such a person is often the legal or technical specialist. He will normally remain silent throughout the negotiations unless called upon to answer a direct question.

B. *The Bargaining Table*

As part of the over-all strategy of seeking to negotiate on its own grounds, the government party should produce a first draft, control the agenda, and determine the procedure. In this way the order of presentation of points would be that selected by the government, and the other side would be forced to negotiate the government's proposals, and not the other way around.

However, in order to make any progress at all in any negotiations, the arguments and proposals of each party must, of course, be communicated to the other. The central forum for this is the bargaining table, which is the most intense part of the bargaining process. It calls for mutual exchanges; and it consists of arguments and counter-arguments, proposals and counter-proposals, all directed towards reaching agreement on actions and outcomes mutually perceived as beneficial. The communication implied in this movement is intended to alter the other party's perception of the situation, and includes resort to all sorts of strategies and techniques, including persuasion through threats and promises, *fait accomplis*, and other actions aimed at narrowing or widening the range of available outcomes and alternatives.

We shall now discuss some of the strategies commonly employed at various phases of the bargaining table, as well as the negotiating techniques or tactics typically called into play at that level.

1. General Strategies at Bargaining Table

(a) Making and Receiving Proposals

At the bargaining table, the various propositions and arguments which the parties may have previously advanced are now reduced into concrete proposals, which can then be negotiated. Arguments by themselves cannot be negotiated. One party sets the ball rolling by spelling out its proposals on a given issue according to the agenda. There is sometimes advantage in asking the other side to speak first, but this largely depends much on the situation. Speakers must be conscious of their choice of words. The importance of language here lies in the fact that some words have different meanings in different cultures, especially in translation, and that the speaker does not wish to be needlessly misunderstood or offensive.

Ideally, only one person should be responsible for making proposals and agreeing to compromises. While others may be allowed to speak in their own areas of competence, the team leader should be the one with power to commit the government, in the case of the government team. There should never be occasion for dissension demonstrated in the ranks of the team. Arguments among team members should be reserved for recesses out of the hearing of the other party. When open disagreements occur among government negotiators, the foreign investor tends to select, as his allies, those government representatives who support him on a particular issue. The strength of the negotiating team is thereby eroded.

A most useful strategy in handling proposals and counter proposals is to summarize the position being advanced. This helps people to concentrate on the business on the table, and reminds everybody of what is going on. When receiving proposals, it is neither wise nor proper to interrupt the other person from stating his case. In the process of interrupting him, one may miss something beneficial which was about to be proposed; and, in any case, people resent being interrupted.

It is a common strategy in negotiations to present a list of proposals consisting of demands, objections and requirements to be followed by the suggestion that they are all dealt with at one time. One should beware of the error of treating the issues piecemeal. It is essential to keep all the issues in dispute linked up to the bargaining step and treated as a package.

It may be impolitic to engage in instant rejection of the other party's proposals. Even when the idea is absolutely unacceptable to one's side, it is best to treat it and its proposer with some respect. There are other ways of rejecting the proposal which are less likely to antagonize the other party. It is best to listen to the proposal, ask for clarification on any points which are not clear, and then either ask for time to consider it or, if one is well prepared, give a considered response to it.

On the other hand, if one is faced with a blanket "no" to one's own proposals, an attempt should be made to present alternatives rather than give up immediately. But this strategy must not be overdone to the point of encouraging the other to reject one's offers in the hope that more acceptable alternatives will be readily forthcoming.

(b) Communication and Persuasion

As already noted, the communication implied in bargaining is intended to alter the other party's perception of the situation. Communication itself is not always direct; quite often in negotiations there is communication through signalling. Signals are indirect messages which consist of qualifications placed on statements of positions. If, for example, instead of simply saying to the other party, "We will never agree to what you are proposing," one were to add "in its

present form," the addition would suggest to the other side that if he were to amend his proposals in some way, there would be the possibility of an agreement.

The aim of persuasion in communication is to alter the other party's perception of the situation. To persuade the other party to accept a proposed term, one must provide him with the motivation to accept. This can be done either by showing the other party that it is in fact in his interest to do so, or by offering him an incentive to accept that proposal. Persuasion thus involves threats and promises. A threat is a representation that if another party acts in a way one disfavors, one will take an action detrimental to that party. On the other hand, promises are representations that if the other party behaves in a way one favors, one will then take an action beneficial to the other.³²

(c) Flexibility and Firmness

The question of how far to make concessions at the bargaining table always arises in negotiations. This is related to the issues of flexibility as opposed to firmness. Some believe that it is important to make concessions in order to keep up the tempo of negotiations, or in order to keep a positive atmosphere. But economic realities and other pressures should dictate the point at which a negotiator compromises. Before making concessions, it is useful to ask the questions: "What is the concession worth to my opponent? What does it cost me? What do I want in exchange?" A good working principle on concessions is not to give away anything without getting something in return.

These considerations indeed boil down to the choice between firmness and flexibility in negotiations. Flexibility enables the negotiator to revise expectations upwards as well as downwards, and if one has not been overly firm on a specific issue, it is easy to revise one's position in the light of the other side's flexibility. At the same time, flexibility can remove all the negotiating cards one may be carrying. The more flexibility one displays on every issue, the more the other side gets the impression that one does not really value one's position very highly. Consequently, the other side may increase his stubbornness in response to one's flexibility. A good working rule is to be firm on generalities and flexible on specifics in the opening rounds of the bargaining. This gives more room for maneuver.

(d) Adjournments

The main purpose of an adjournment is to review and assess progress against one's prepared objectives and one's estimate of the other party's objec-

³²SAWYER & GUETZKOW, *supra* note 10, at 483. A distinction may be made between deterrent and compellent threats. The former involves commitments to retaliate in the event that the other side carries out a specified action. Compellent threats, by contrast, are based on commitments to punish the other side in the event that he does *not* carry out a desired act. T. SCHELLING, *ARMS AND INFLUENCE* 69-78 (1966).

tives. Hence adjournments are partially reparation sessions for the reconvened meeting. They may be taken for consideration of or for such necessities as eating and sleeping. But equally important, adjournments provide the negotiators with the opportunity to consider whether or not to make concessions. During the recess, the compromises and new points are considered. The team leader is given appropriate advice as to the consequences and the effects on other points in the negotiating position.³³

The number and frequency of adjournments will depend upon the normal practice of negotiators in the given environment and business. However, a wrongly timed adjournment can actually weaken the pressure upon the other side. By the time the session is reconvened, the other side may have had a second thought or even new instructions.

(e) Staying Power in Negotiations

There is a tendency for some negotiators to start by rattling off a list of demands and requests, and then to recoil or even give up negotiations when rebuffed by the other party. However it should be remembered that bargaining involves exchanges hopefully leading to an agreement. This calls for great staying power on the part of negotiators. Moreover, since negotiating strength may alter throughout the course of negotiations, there is an obvious need for well-organized, continuously available, back-up services.

(f) Publicity

Publicity in negotiations should generally be avoided. Premature publicity almost invariably works to the disadvantage of the government officials conducting the negotiations. Occasionally, publicity frightens the investor, leads to public criticism and to expectations which can only lead to disappointments. Progress reports are useful, and the texts of press releases agreed upon by both sides could be issued. However, on the whole it is best to give full publicity to negotiations only after a final agreement has been reached, or the negotiations permanently broken off.

2. Common Negotiating Techniques

There are standard tactics which are practiced with sufficient frequency at the bargaining table, among which are the following.³⁴ Some so-called bargaining techniques are unplanned and may simply be natural reactions based on the personality of the negotiator, others may result from a deliberate decision to use them as a strategic weapon in dealing with the other party. It is the latter approach that constitutes negotiating techniques in the real sense. In

³³KENNEDY, *supra* note 9, at 78; LIPTON, *supra* note 9, at 3.

³⁴The terminology adopted in describing these tactics or techniques are largely those of, KENNEDY, *supra* note 9; LIPTON, *supra* note 9.

general, the relevance or effectiveness of some of these techniques depends on the cultural environment and the natural characteristics of the negotiators for different cultures react differently to approach and style.

(a) Threats

The use of threats as a tactic amounts to stating that unless the other party concedes what one wants, there will be resort to some sanction which that other party does not really relish. For threats to be effective, however, the threatened party should be convinced that the detrimental action will not be taken if he complies; and that the threat is credible, in the sense that the threat giver is perceived as having the means to carry out his threat. But the latter perception itself depends in part on the credulity of the threatened party.

A familiar form of threat during bargaining is the walk-out threat. This can be very effective when used by the MNC negotiating team, particularly when the government team is led by a civil servant who is then faced with the unhappy prospect of having to explain the failure of a project on which so much hope has been laid by the national authorities.

In using threats, it is essential to separate what one needs to state in order to underline one's credibility from what one may be tempted to overstate, thereby risking the calling of one's bluff. In general, it is not wise to threaten, unless one is prepared to carry out the threat; for once the bluff is called, it might be difficult to regain credibility.

(b) *Fait Accompli*

This tactic attempts to reduce the available options by eliminating certain outcomes and alternatives. The effect is that the party who is the target is left with a situation in which his best outcomes are eliminated, and the least undesirable of the remainder are just the ones preferred by the initiating party.

(c) Brinkmanship and Intransigence

Brinkmanship describes the situation in which a bargainer expects his opponent to make a definite concession at some point in the future, and, in light of this, is prepared to wait, making no concessions himself. It is a particular case of intransigence, in which a party expects to obtain agreement on his initial terms, anticipating that the other party will make all of the concessions.

(d) Non-negotiable Terms

Closely related to the tactic of intransigence is that which presents certain proposals as "non-negotiable." Falling within the same category is the "mandate demand," in which the other party is told that one is under instructions to get this or that, and that there are no instructions to do otherwise. Quite often,

however, the non-negotiable stance arises, not as a ploy from the negotiators themselves, but in conformity with principles enunciated by the head of government or minister, or embodied in legislation.

(e) Delay

Deliberate delay in agreeing to a point is a common tactic. The question is to decide at what point one should be reasonable and how long one should maintain his position. While this is a useful technique, it should be remembered that delay can cut both ways. In the case of mineral agreements, for example, it may be to the government's advantage, particularly where significant exploration costs have been incurred and a feasibility report paid for by the investor, to put pressure on the latter by spreading out the negotiation while the investor watches the anticipated costs escalate beyond his projections. On the other hand, governments may have already planned for the use of the expected revenues from the project so that any delay from the investor can hurt rather badly.

(f) Public Propaganda

It is possible to increase one's bargaining position by deliberately creating a favorable public opinion through statements calculated to arouse sentiments admitting of no concessions in certain areas. A government may, for example, announce that it is about to enter into negotiations on a mineral agreement from which it expects favorable results, some of which might even be spelled out in detail in press statements. The Government would then argue at the bargaining table that because the public expects it to negotiate certain terms, it can accept nothing less. A related gambit is to attempt to convince the other party that he would earn bad publicity if he were to pursue a certain course of action.

(g) Fairness and Stability

Pursuant to this strategy, the host country persuades the MNC investor that the stability of their agreement rests upon the public's perception of the fairness of the terms. This tactic must be used with restraint however as the MNC investor will conclude that the agreement is possibly unstable despite numerous government assurances.

(h) Dangerous Precedent

Yet another tactic, linked to the "public opinion" idea, is for the negotiator to explain his inability to accept a certain request from the other party by arguing that if he agreed to that particular demand, he would find himself in a position of having to do so to all other parties, which he could not afford to do. This tactic is often called into play because of the possible inser-

tion of most-favored company or most-favored country provisions in investment agreements.

(i) Lack of Authority

A negotiating party may obtain an advantage by pretending to have less power than he actually has. His principals may also reinforce this pretense of limited authority, or lack of authority, by deliberately giving him instructions which are difficult or impossible to change, and making sure that the other party understands the situation. From the government standpoint, this technique may avoid the problem of premature commitment and also the embarrassment of finding the government committed only to have the MNC announce that its board of directors insist on one additional point.

(j) Pre-conditions

A party may declare that he has pre-conditions which must be met if he is to negotiate on some disputed issue. These pre-conditions, which are really "short-gun" tactics, are aimed at weakening the bargaining power of the other party; for the idea is to force the latter to modify his position even before negotiations begin.

(k) Bluffing

This amounts to demanding more than the bluffing participant really expects to obtain from the other party. An investor may also bluff by referring to a project as being of marginal importance to his over-all investment plans. A variation of this tactic is to give the impression that one has much better proposals from the other party's competitors, in the hope of persuading the latter to increase the attractiveness of his offer. But the danger of bluffing in any negotiation is that the bluff may be called. Basically bluffing involves the intention to advance a sham bargaining position, for example, making demands which are too high, that the other party considers less favorable than his minimum expectation. Advantage may accrue if the other's minimum disposition is initially lower than was thought, or if it simply succeeds in lowering that other party's minimum disposition. On the other hand, it may be difficult to obtain public support for extreme positions and, in any case, the other party may consider that agreement is impossible and discontinue negotiation.

Closely allied to bluffing through advancing a sham bargaining position is the tactic of deliberately presenting two bad alternative proposals to the other side, one of which is worse than the other. The opponent is then intimidated to accept the other in order to avoid the more horrific proposal. But this tactic may be counter productive, since it can provoke the other party to surface with his own equally extreme alternatives.

(l) Deception and Lies

A party may go further than mere bluffing. He may indulge in outright lies or deception in order to give the other party a false perception of the situation he seeks to regulate. A variation of this attitude is to deliberately paint the picture so black or so alarmingly that the other party feels he must accept the changes being proposed, or face certain doom.

(m) Linking the Issues

Earlier this author suggested that it is a good idea for a party to link up his proposals and see them as a package. However, the same approach, adopted by the other party, can turn out to be a dangerous tactic. He may start negotiations from a position of weakness on some issues. His strategy then would be to link the issues on which he is weak with others on which he feels stronger. One must watch out for this type of maneuver.

(n) Salami Tactic

The tactic here is to introduce an arrangement a bit at a time and over a relatively long period, so that there will be less resistance from those affected.³⁵

(o) Tough Guy, Nice Guy

Here, one member of a negotiating party opens the negotiations with a very hard line on an issue ("tough guy"). He is then followed by another member of his team who puts forward a more reasonable view in comparison with the first speaker, though his position may still not be acceptable to the other party ("nice guy"). The temptation is thus created to accept the nice guy's version as the lesser of two evils. The "tough guy" part is therefore often played to establish a high negotiating platform, thereby creating negotiating room for the nice guy.

But this tactic has risks for the user. If the "tough guy" part is overdone, it may provoke rather than intimidate. On the other hand, if the nice guy comes in too early, he may increase the opponent's confidence because the planned softening of the attitude might be interpreted as a response to the opponent's reaction to the tough guy's performance. This will in turn encourage the opponent to resist new proposals.

A variation of the "nice guy" tactic is that of referring to the senior officials, to whom the government and the MNC negotiating teams respectively report, as being very difficult; the intention here being to make the other side negotiate with the man across the table than the "unreasonable" bosses at head office.

³⁵It is called the Salami tactic because, like salami, it comes in thin slices and is not eaten at one go, lest it become unpalatable. KENNEDY. *supra* note 9.

(p) Split the Difference

Here the investor's team would ask the Government team to be reasonable and meet them half-way, so that the investor would retain a certain level of profits and other advantages. The trap here is that the Government may already have given out a figure in a spirit of compromise. There is therefore no further "splitting of the difference" to be done. This tactic merely encourages both parties to always ask for more than it is ready to accept, and to keep its distance in the bargaining.

What all these bargaining tactics or techniques have in common is the attempt to generate and exploit uncertainties in the other party's thinking about the nature of the situation; and thereby to affect the outcome of the negotiations.

C. *Outcome*

Out of the process of bargaining emerges a specified outcome. The form of these outcomes vary from formal to informal and often vague understandings to a virtual lack of agreement in some cases. But let us assume that there is agreement.

Agreements cover formal treaties, executive agreements, explicit but informal understandings such as side letters as well as tacit but informal understandings. Side letters as a form of agreement call for comment. Some experts question the legal validity of such documents, that is, the extent to which they are binding on the parties. Others attack them on moral or political grounds, that is, the propriety of the government covering up part of the agreement reached with the investor.³⁶

Whatever form the agreement takes, there is an interface between it and the applicable general laws and regulations. The development of contractual terms covering foreign investment activities is rarely confined to the bargaining table. The applicable general laws and the provisions of the agreement will in turn be amplified and clarified by administrative regulations, which will also fill the gap on matters on which the agreement is silent or vague. The expected use of regulations must therefore be taken into account in the outcome of negotiations.

Formal considerations of the agreement aside, there is always an important question as to how "good" the outcome is, and in what sense this may be evaluated. Whatever the clarity of the outcome, each party may place upon it an approximate value, if not a completely determinate one. The issue that

³⁶The device of side letter is often used if one side or the other is concerned with the inclusion of a particular provision in a public agreement would cause other investors or governments to seek parity treatment, or to raise expectations needlessly. Such a provision is then excluded from the public document and placed in a private one in the form of a letter or exchange of letters (termed "side letters").

arises is: Given the alternatives among which each party had to choose, and the values of the associated outcomes, does the agreement provide a good solution.³⁷ This calls for a consideration of the resulting structure of gains between the investor and the investee state.

We have already encountered the concepts of gain and the distribution of gains. The scope of the gains to be distributed from a MNC investment will differ from project to project and from industry to industry. In export-oriented mining projects, for example, the traditional agreement on the distribution of gains has tended to center on the distribution of the proceeds from gross value of the exports alone, i.e. increase in the retained value from a given export value free on board. In contemporary agreements, however, what matters is the over-all distribution of benefits from exports, i.e. from the final consumer value of commodity exports, including margins accruing to forward linkage operations such as shipping, processing, fabricating, distribution and marketing.

Issues as to the fairness of the distribution naturally come up for discussion. Some of the notions relevant to the determination of the fairness are the retained value concept; retained value as a proportion of export earnings; and the internal rate of return. There is a form of social cost-benefit analysis in all these measuring concepts, which also have their limitations. Among the general policy indices which come into play in the social cost-benefit exercise are the following: the extent of host country policy control over the project and its general compatibility with national development objectives; contribution to employment and upgrading of skills in the economy; improvement and spread of technology in host country; financial gains from the project, including revenue from tax and dividends vis-à-vis capital outflow in the form of dividends, fees for management and technical services, royalties for use of technology; import bill for machinery, spare parts and raw materials vis-à-vis the volume of exports or foreign exchange savings on import-substitution goods; net gains from external loans, i.e. the credit vis-à-vis repayment and servicing obligations; the impact of all these capital outflows on the balance-of-payments of host country; and the impact of fiscal incentives on national income.

In all this, it should be emphasized that each party has an interest in arriving at a solution that is quite fair to the other. If an agreement has a chance of being durable, it is important that it be founded on reciprocal advantage. If a party, by hard or even dishonest bargaining, succeeds in getting the other to accept an agreement providing an outcome only slightly above the latter's minimum disposition, a slight shift in the relative power of the two parties may well cause the agreement to be rejected by that party. We are now in a position to consider the various factors affecting the outcome of negotiations, in particular the distribution of gains between the parties.

³⁷SAWYER & GUETZKOW. *supra* note 10, at 488.

IV. FACTORS AFFECTING OUTCOME OF NEGOTIATIONS

The nature of the distribution of gains is a function of a party's relative bargaining position within an over-all bargaining situation. The latter concept describes the interaction among all those factors which affect the party's ability to make choices in such a way as to maximize his advantage. One is therefore led to an examination of the various factors determining the relative bargaining positions of host governments and MNC's, including an evaluation of the bargaining skills available to each party in the bargaining process.

There are certain factors or conditions that greatly influence the negotiation process in general. These may be grouped into two main categories. The first category addresses the specific conditions under which the process takes place. These conditions include the factors concerning the personal properties of the parties, their thought processes, extent of their knowledge and bargaining skills, their patterns of behavior and the psychological setting of the negotiations. These may be called the behavioral factors. The second category addresses the general background factors in existence at the outset of negotiation. These factors concern the over-all environment, social, political and economic, and relate to the physical setting. These may also be referred to as the institutional factors. They can usually be assessed prior to the onset of negotiations, whereas the behavioral factors consist of concurrent conditions whose values are specific to a particular negotiating situation.³⁸

The behavioral factors can in turn be grouped into the following general classes: (a) the level of the negotiations (i.e. the setting) — whether at the highest political level, at the level of middle-level technocrats etc.; (b) whether the proceedings are closed or open; (c) the number of negotiating parties; (d) the number of individual participants; (e) the amount of information each party possesses about the other; (f) the amount of "stress" working on the negotiators (e.g. the importance of the outcome, the difficulties involved);³⁹ (g) the timing, duration and phasing of negotiation. The importance of timing lies in the fact that other factors such as stress, information, as well as the parties' advantages, alternatives and preferences change during the process of negotiations, with possibly serious consequences for pay-off or gains expected from them. The background factors, on the other hand, include such items as the broad cultural tradition of the parties or nationalities involved, the general attitude between the negotiating team to other officials of its government, the level of social and economic development of the negotiating countries and their general place in the world economic and political situation.

³⁸*Id.*, at 490-500.

³⁹The word "stress" is used to describe the possible effects upon negotiation of such psychological factors as a constraint to reach agreement by a certain time, a high level of antagonism between the parties, threatened detrimental actions in the event of non-agreement, importance of the negotiation, and other conditions usually impeding agreement. SAWYER & GUETZKOW, *supra* note 10, at 498.

A. *Background Factors Determining the Bargaining Positions of Host Country and Multinational Corporation*

Turning specifically to negotiations with multinational corporations, experience points to some crucial background factors which tend to determine the relative bargaining position of the host country and the MNC's. These may be discussed under four main headings: host government philosophy and host country environment; the strength of the MNC and related factors; the nature of the commodity or project in question and the international setting.

Under the first heading, there are political, administrative, legal and economic factors. Politically, one must investigate the degree of independence or linkage of the regime with local politico-economic groupings. The political philosophy of the Government, especially in relation to foreign capital investment; the stability and strength of the Government, and finally, the incidence of foreign penetration and control over various productive sectors in the country are further considerations that one must investigate.

Administrative and legal factors include the quality of the bureaucracy, especially in relation to general skill and efficiency, the extent of education and training in the system, the quality of technical cadres to perform corporate functions independently, factors relating to skills in negotiations and availability of information on MNC's, which will be discussed separately under bargaining skills; and the laws and regulations of the country, especially these pertaining to foreign investment.

Economic factors cover such matters as dependence on foreign exchange earnings from exports in general, and from the commodity concerned in particular, including the degree of export diversification; the position of the country in world trade of the commodity concerned; the position of the country in world production and reserves in that commodity; the proportion of the commodity exported in relation to the host country's production; relationship with the international economic system and its external economic and financial dependency, e.g. the balance-of-payments and debt position.

Under the strength of the MNC and related factors, we must first of all consider its international control relationships. This would cover the structure of the oligopoly, that is, the degree of vertical and horizontal integration and control over production and exports, shipping, processing, marketing and distribution; the existence of cartel arrangements, including gentlemen's agreements in the industry; oligopoly dynamics including the weakening of the oligopoly through emergence of independent firms in the industry; position of the particular MNC in the industry, e.g. its share of markets, raw material supplies, production and processing capacity; and corporate strategies regarding global control over raw material.

Secondly, we should consider the relationship between the MNC and the

host country concerned. Of relevance here are the structure of the MNC in the host country — the legal status of the subsidiary in the corporate system, related and associated companies through interlocking directorships and management and technology contracts; the transnational mobility of the corporation; its dependence on raw materials from the particular host country and the possibilities of shifting to other supply sources in the short and long run; debt-equity factors of the investment project; and the extent of investment planned or already realized in that host country. Thirdly, the extent of support that the MNC enjoys from its home country is to be considered.

As far as the nature of the commodity is concerned, we should investigate the impact of the trends in supply and demand, including projection of such trends and the importance of trade in world production of the commodity.⁴⁰ Other factors relevant to an investigation are trends in demand and supply of substitutes, income, price elasticities, elasticity of substitution and market structure. Market structure includes the importance of formal markets and of arm's length trading versus intra-company transactions, the geographic concentration of countries in production, processing, trade and consumption of the commodity, and the nature and structure of the industry, e.g. the proportion of export value of primary commodities to final consumer value in the importing country; the dynamics of resource discovery and, in the case of minerals, trends in reserves related to current production; the trend towards massive size of capital requirements for mining projects, i.e. increasing the capital investment required per metric ton of production of the specific commodity concerned.

There are also factors associated with the international setting of the negotiations which may be equally relevant. These include possible repercussions of the rhetoric and achievements of political liberation and decolonization, and other matters linked up with a changing world political and economic liberalization to accompany political independence, culminating in demands for a new international economic order, in juxtaposition to the steadily growing power of MNC's in all spheres of activity; the impact of international organizations such as the United Nations and its various agencies (especially UNCTAD, IMF, IBRD) and the non-aligned movement; the scope of international commodity agreements; the strength of producers' associations; multipolarization of the world economy; preferential schemes extended to a particular group of countries by certain importing countries and other policies imposed by consumer or importing countries; and potential or real sanctions imposed by home governments of MNC's and/or international institutions on countries which embark on policies such as expropriation.

⁴⁰In the specific case of trends in supply and demand, the market situation would tend to oscillate between the two extremes of bilateral monopoly and pure competition, the former describing the situation in which one seller is the only producer or owner of a particular commodity, and the buyer is the only one interested in acquiring it. Between the two positions there are many other cases with different degrees of bargaining and market influence on price information, e.g. the case of bilateral oligopoly, in which only a small number of sellers have access to goods which interest only a few buyers.

All the factors outlined above constitute no more than a useful indicative checklist, for it is impossible to assign definitive values or weights to factors which are, in their very nature, in continuous change. They are, in any case, inexhaustive. Furthermore, some of the factors may have no relevance to particular negotiations.

B. *Behavioral Factors: Bargaining Skills*

Although the structure of the industry, the requirements of the particular firm, economic and political forces in the host country and other background factors set boundaries on the kinds of agreement that can be concluded, some of the behavioral factors mentioned above are nevertheless significant determinants of the kind of outcome that is reached within those boundaries.⁴¹ Here we shall single out bargaining skills and make a few comments on them.

Bargaining skills describe the personal capacity of the bargainer to shift the elements of the bargaining situation in his favor. As indicated in the introductory part of this paper, there are three aspects to the acquisition of such skills. These aspects are mastery over the technical issues often raised in the foreign investment process, acquisition of information on the prospective MNC partner, and negotiating style and techniques. It goes without saying that it is an advantage in negotiations to be more intelligent, more skilled in argument, more knowledgeable, in addition to having more economic resources.

The type of information on the MNC required for negotiations will extend to its global network, objectives, methods and practices, and investment size. Success in this area, however, is a function of the extent of exchange of information among concerned countries, in view of the transnational nature of MNC operations. With regard to negotiating style and techniques, attention may be drawn to personal qualities such as diplomacy, affability, forcefulness, intelligence, and the ability to recognize and seize opportunities during negotiations.

The personality of the negotiator may be more or less important depending upon the circumstances. It seems that it would be more important when information is lacking or when the objective advantages of the negotiating party are relatively modest. One common personality characteristic is the authoritarian type. Authoritarian personalities are thought to change their attitudes less readily. Whereas, non-authoritarians might reverse their positions more easily if additional information became available. In other words, the former is less willing to compromise. Another personality characteristic is ego control. Persons with such characteristic are more predisposed to respond to prestige suggestions. On the whole, whether authoritarianism is generally functional or dysfunctional to the process of negotiation would seem to depend upon

⁴¹SMITH & WELLS, *supra* note 1, at 153.

whether the particular negotiating situation calls for rigidity or flexibility. Different bargaining situations may demand varying individual characteristics.

However, the personality aspect of bargaining skills is not the only determining circumstance. The negotiating experience, at least in respect of mastery over technical substantive matters, can be taught or acquired to a very large extent through training. Some academicians have attempted to devise courses on negotiations patterned after simulated negotiations. Others propose assigning prospective young negotiators to negotiating teams just to listen, to get the "feel" of negotiations, and in that way acquire some experience. But, as Charles Lipton aptly states that there is simply no substitute for actual experience in negotiations.⁴²

CONCLUSION

In this paper the author has sought to provide a conceptual framework for case studies by outlining the main stages of negotiations, indicating some of the main factors affecting the relative bargaining position of the parties to negotiations with multinational corporations, and providing indices for evaluating the resulting structure of the distribution of gains from such negotiations.

Parties to a conflict resort to negotiations when they have varying degrees of power, but not absolute power, over each other to force a decision. As long as both parties consider that the benefits of resolving the conflict through negotiations are greater than the perceived benefits of resolving it through some other means, negotiations are likely to be preferred to other conflict resolution procedures. In the specific case of multinational corporations, negotiations typically arise when the host government seeks to establish a specific agreement tailored to the needs and peculiarities of particular projects, rather than leave them to operate under the general laws of the country. In any case, such laws are generally deficient in tackling the multifarious issues that present themselves for resolution in the foreign investment process. Negotiations with MNC's do not only come into play at the pre-establishment phase of projects. Re-negotiations often become necessary as a result of fundamental changes in the circumstances of a project, or as a result of a general change in political orientation.

Negotiations have several phases, of which the bargaining process is the most intense. The latter describes the actual process by which the terms and conditions of a potential agreement, including the structure of distribution of gains, are arrived. This involves a great deal of preparation — feasibility studies, establishing priorities and objectives, collecting information on the other party, drafting proposed agreements, formulating the agenda and composing the negotiating team. In all these preparations, the government's over-

⁴²LIPTON. *supra* note 9, at 5.

all strategy in negotiations with MNC's would be to force the latter to negotiate on the government's own grounds, and not the other way around.

Upon completion of the preparatory stage of the bargaining process comes the actual business of sitting at the bargaining table to negotiate a definite agreement. We have outlined some of the basic strategies that parties use in proceedings at the table. These are: making and receiving proposals, communicating to and persuading the other party, maintaining a balance between flexibility and firmness in bargaining, timing adjournments and controlling publicity.

We have also highlighted some common negotiating techniques to which parties frequently resort at the bargaining table. Threats, *fait accomplis*, brinkmanship and intransigence, "non-negotiable" terms, delay, public propaganda, the linkage of fairness to stability of agreements, the fear of concessions leading to "dangerous" precedents, alleged lack of authority, preconditions, bluffing, outright deception and lies, linking non-cognate issues, the "salami" tactic, the tough guy-nice guy syndrome, and the tactic of splitting the difference were all mentioned and discussed briefly. What all these bargaining tactics have in common is the attempt to generate and exploit uncertainties in the other party's thinking about the nature of the situation.

Out of the bargaining process emerges an outcome, which we have assumed to be one of agreement rather than deadlock. The agreement has to be placed within the general context of applicable laws and administrative regulations, which are expected to supply gaps and provide interpretations missing from the formal document.

An inevitable question about outcomes concerns the value or fairness of the agreement reached, and this calls for a consideration of the resulting structure of gains between the investor and the investee state. In the paper we have indicated some of the notions relevant to the determination of fairness, such as the retained value concept, retained value as a proportion of earnings, and the internal rate of return. Some of the general policy indices which come into play in the social cost-benefit exercise implied in these notions have also been mentioned.

Finally, the paper analyzes some of the various factors affecting the outcome of negotiations, in particular the distribution of gains between the parties. We have asserted that the nature of the distribution of gains is a function of a party's relative bargaining position within an over-all bargaining situation, which is in turn affected by background institutional and behavioral factors. Among the most important of the latter set of factors is the bargaining skill of negotiators. It is this which helps to shift the elements of the bargaining situation in a party's favor within the boundaries set by the institutional factors.

As stated earlier the three aspects to the acquisition of such skills are

mastery over the technical issues often raised in the foreign investment process, acquisition of information on the prospective MNC partner, and of negotiating style and technique. The personality of the negotiator may be more or less important depending upon factors such as availability of information, degree of stress and the objective advantages of the negotiating party. Bargaining skills can largely be acquired through appropriate training methods, including simulation, "in-service" observance of negotiators at work, and actual participation in negotiations. Host states should therefore take more interest in the training of their nationals in the area of negotiations by buttressing the above methods with academic courses, workshops, seminars, and advisory services obtainable within the United Nations system and other appropriate international organizations.

In respect of negotiations with MNC's, the background factors have been discussed under four main headings: host government philosophy and host country environment; the strength of the MNC and related factors; the nature of the commodity in question; and the international setting. In this connection, one may assert that the future bargaining strength of the developing world lies partly in the fact that it is endowed with considerable but as yet little exploited natural resources in demand in traditional markets in the advanced countries and elsewhere, partly in the potential markets which integrated national development, in addition to multinational co-operation, can create. It must therefore be central to their strategy in international economic relations to secure by negotiation the most effective combination of imported components of growth in return for access to the region's natural resources, domestic market opportunities, as well as fiscal and other economic incentives.