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BOOK REVIEW:

GETTING TO YES -- Negotiating Agreement Without Giving In

By Roger Fisher and William Ury

Houghton Mifflin Company

Boston, Massachusetts 1981

Roger Fisher and William Ury of the Harvard Negotiation Project have produced an easy-to-read handbook for negotiation that implements the social science of interpersonal communication. Getting to Yes<sup>1</sup> provides a method of conflict resolution that can be applied to all settings. Their negotiation approaches can be useful to attorneys and other professional negotiators as well as to lay-persons struggling with such daily problems as purchase/sales agreements. Its broad appeal as a tool for resolving conflict is created by detailing commonsense skills known to many but rarely presented in such an organized and readable form. This in-depth analysis of established methods of negotiation spawns innovative and promising approaches which may be particularly useful as a tool for furthering third world interests.

In Getting to Yes, the standard negotiation approach of positional bargaining<sup>2</sup> where each side advocates a stand, is replaced by the non-adversarial approach of "principled

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<sup>1</sup>FISHER AND URY, GETTING TO YES, NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981) [hereinafter cited as Fisher and Ury].

<sup>2</sup>Id. at 3.

negotiation"<sup>3</sup> which provides for the decision of issues on their merits. Initially, the authors pinpoint specific weaknesses in the more traditional "positional bargaining" model.

The two prime components of any negotiation are the parties' substantive interests and the relationship between these parties.<sup>4</sup> Fisher and Ury argue that during positional bargaining these two elements tend to get lumped together as egos become involved in advocating substantive interests.<sup>5</sup> The resulting ego protective posture so affects the visions of the parties that unfounded inferences about the other party's attitude, intent, and position are drawn from their comments.<sup>6</sup> These promote misunderstanding and inhibit the bargaining process. Separating the relationship from the substance of negotiation avoids such misunderstanding and the parties relationship is preserved.<sup>7</sup>

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<sup>3</sup>Id. at 11.

<sup>4</sup>Id. at 21.

<sup>5</sup>The United States' interest in promoting the "Free enterprise" system has traditionally been a matter of national pride and identity. This "nationalism" is a major consideration in dictating foreign economic policy. "The administration continues to give special attention to those regimes that most loudly proclaim their pro-American allegiance, regardless of their commitment to equitable development in their own countries." T. Ehrlich and C. Gwin, A Third World Strategy, 44 FOREIGN POLICY 145 (Fall, 1981).

<sup>6</sup>The adverse result of which the authors warn has been a "reactive" foreign policy in which American adversaries determine U.S. priorities -- not clear calculations of U.S. interests in the Third World. Id. at 146.

<sup>7</sup>FISHER and URY, supra note 1 at 21, 22.

The traditional model also limits the negotiator to hard or soft sell tactics where the intent is either to win at all costs or to avoid personal conflict. These methods are inefficient as they endanger the relationship between the parties and break down when negotiations involve more than two parties.<sup>8</sup> More importantly, they often lead to inequitable agreements since the result is largely dependent upon what the initial positions of the parties were.

The Cancun Summit of October 22 & 23, 1981 provides a useful framework in which to apply and contrast the positional bargaining and principled negotiation approaches. To ensure U.S. participation in the conference between developed and developing nations, it was agreed that there would be no formal agenda, no substantive negotiations and no final communique which summarized the results.<sup>9,10</sup> Although these terms demanded by the Reagan administration undermined the potential importance of the summit, they also created a neutral medium into which we can now introduce these negotiation techniques and speculate objectively which would have been more effective as a means of reaching a true "global" agreement. The examples herein suggest the positional approach was least effective and led to a breakdown between summit delegates.

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<sup>8</sup> Id. at 7.

<sup>9</sup> J. Lyles, Beyond Cancun, 98 CHRISTIAN CENTURY at 1149 (1981).

<sup>10</sup> Souvenirs of Cancun, 145 AMERICAN at 273 (1981).

Consistent with the U.S.'s approach in past dialogues with the Third World community,<sup>11</sup> the administration predictably, maintained a "hard sell" campaign at Cancun.<sup>12</sup> In short, the U.S. position was that "[F]ree enterprise can best solve the problems of the poor nations...."<sup>13</sup> Fifteen developing countries were represented at the Cancun Summit.<sup>14</sup> The dialogue broke down where several parties were involved, bearing out Fisher's and Ury's conclusions. This impasse also resulted from the Reagan Administration's hard sell tactic which proved simplistic (i.e., the free enterprise system alone can address the needs of the Third World countries). The Administration's bargaining approach failed to recognize the differing needs of developing versus underdeveloped countries and the inability of the "free trade" policy to relieve poverty in underdeveloped countries lacking in raw materials.<sup>15</sup>

"For middle-income countries, much can be done through trade and investment policies, programs and resource trans-

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<sup>11</sup>International Meeting on Cooperation and Development: Remarks of Reagan, 17 Weekly Compilation of President Documents at 1189, 1191 (Nov. 2, 1981).

<sup>12</sup>Yalowitz, Third World: Uncle Sam's Tough New Stand, 91 U.S. NEW AND WORLD REPORT at 20 (Oct. 26, 1981).

<sup>13</sup>Souvenirs of Cancun, 145 AMERICAN at 273, 274 (Nov. 7, 1981).

<sup>14</sup>In attendance: Developed nations -- Austria, Britain, Canada, France, Germany, Japan, Sweden, United States; Developing nations -- Algeria, Bangladesh, Brazil, China, Guyana, India, Ivory Coast, Mexico, Nigeria, Philippines, Saudi Arabia, Tanzania, Venezuela, Yugoslavia.

<sup>15</sup>J. Lyles, Beyond Cancun, 98 CHRISTIAN CENTURY at 1150 (Nov. 11, 1981).

fers. . .[b]ut for poorer nations, increased development assistance on concessional terms is also needed."<sup>16</sup>

The United States' negotiating stance regarding increased aid to developing countries is another instance where the use of positional bargaining created pitfalls which guaranteed the failure of the Cancun Summit as a means of attaining a step towards global agreement.<sup>17</sup>

"Principled negotiation" avoids the pitfalls of positional bargaining through the application of four major approaches. First, the relationships between the parties - their personalities and their egos, must be separated from the problem. Secondly, the negotiation must be separated from the problem and focus on the interests of the parties, not on their positions. Thirdly, a variety of possibilities must be considered before deciding what to do, giving careful attention to inventing options which will provide for mutual gain. Lastly, the result must be based on some objective standard.<sup>18</sup>

It comes as no surprise that effective principled negotiation is best accomplished by understanding the other parties' frame of reference. Thus far the authors have told

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<sup>16</sup>T. Ehrlich & C. Gwin, A Third World Strategy, 44 FOREIGN POLICY at 151 (Fall, 1981).

<sup>17</sup>Such governmental assistance by the U.S. has decreased within the last decade. The United States now ranks fifteenth out of the seventeen developed countries in terms of official assistance as a percentage of gross national product (GNP). Id. at 152.

<sup>18</sup>FISHER and URY, supra note 1 at 17, 41, 58, 84.

us nothing novel. What is unique is their advice that the negotiator avoid focusing on facts that confirm her prior perceptions; a good negotiator should not assume to know the other party's intentions. Such assumptions can work to the detriment of the relationship between the parties as well as lead to false conclusions. Instead the negotiators should discuss their differing perceptions explicitly, frankly and honestly. The aim is to lessen the threat to the parties egos by creating a climate of openness and understanding between them. In this way, cooperation in reaching a mutually beneficial resolution is established.

Recognizing and understanding the participants' legitimate concerns is central to prevent a merging of the relationship between the parties and the substantive problem.

Recognizing the participants' legitimate concerns is accomplished by "focusing on interests, not positions." Underlying interests, rather than a negotiator's position will better define a particular problem; thus a thorough search for the interests of each of the parties is necessary. From the pool of identified interests the negotiators then search for shared or compatible interests. Fisher and Ury assert that even behind opposed positions lie more shared or compatible interests than conflicting ones.<sup>19</sup>

When a variety of interests have been defined and options have been created these options should be presented

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<sup>19</sup>Id. at 43.

to other participants as purely suggestions, allowing for modifications while avoiding premature judgment. In this way the negotiator can be concrete but flexible about her proposals.<sup>20</sup>

Fisher and Ury argue that this method allows the negotiators to reach agreement without giving in. Where positional negotiation generally requires compromising one's position, principled negotiation entails sifting-through the factors that have formed each position in a search for common ground. That common ground in turn becomes a basis for a common agreement. Thus neither party has given into the other.

Identifying common interests is the key to the success of this approach. But, the authors do not sufficiently address the possibility of few or no shared or compatible interests between negotiators, beyond stating that this may occur. Suppose the interests that are shared between two parties are minor points unrelated to the major concerns of the negotiators? Fisher and Ury would probably argue that agreement on minor points may allow for "trade offs" at some later time.<sup>21</sup> In any event, traditional "positional negotiation" techniques are less likely to result in common ground than a method which focuses on identification of common interests.

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<sup>20</sup>Id. at 54.

<sup>21</sup>In the union negotiating setting, for example, the employer and employees may agree that contributions to employee's insurance will be paid by the employer. This agreement may be "traded off" to reach a resolution on the major issue of salary wages.

## Invent Options for Mutual Gains

Getting to Yes identifies four obstacles to inventing abundant options. The first is searching for the single answer. This pitfall prematurely bypasses better possibilities. Another cause of the lack of good options is that the parties often view a solution as a win or lose situation. The authors have termed this attitude "the assumption of the fixed pie," where less for you means more for me.<sup>22</sup> Thirdly, realistic options or those acceptable to both parties are often ignored out of self-interest. Possibly the greatest obstacle is premature judgment, which hinders imagination and thus, the creative inventing of options.

Avoidance of these major hindrances will depend upon the variety and creativity of each party's identified interests. Therefore, the negotiator must generate many options before selecting from among them. Invent first, decide later, look for shared interests and differing interests that may be dovetailed and seek to make the other party's decision easy. The opportunity to "dovetail" Western and Third World interests presented itself in the context of the Cancun Summit. The developing nations expressed concern over the lack of technological/education exchanges with the Western world. The "principled negotiation" approach could have resulted in a proposal for long term high level technical and academic training programs for students of devel-

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<sup>22</sup>FISHER and URY, supra note 1 at 61.

oping countries. This option would also address the U.S.'s interest in influencing foreign leaders and the development process. Additionally, the U.S. could alleviate the problem of the under-utilization of institutions that will result from the 25% decline in American eighteen year olds by the end of the decade.<sup>23</sup>

To confront the obstacles created by self-interested ignorance of realistic options the authors suggest molding the option so as to make the other party's decision easy. By providing the other party with the argument she'll need to persuade her clients or constituents the negotiator makes the choice as painless as possible. These arguments might include precedent set by the other party in a similar situation, e.g. past agreements, decisions or statements. Many important items manufactured by the Third World are legally excluded from the U.S. Generalized System of Preferences (GSP) which allows manufactured and agricultural products from developed and developing countries to enter the U.S. market duty free. Third World nations intended to use the precedent set by the establishment of GSP to argue for more equitable product coverage under that system.<sup>24</sup> The use of this past agreement may have made a favorable decision towards developing nations more palatable to the West; if negotiation had proceeded to this stage.

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<sup>23</sup>T. Ehrlich and C. Gwin, A Third World Strategy, 44 FOREIGN POLICY at 145, 159 (Fall, 1981).

<sup>24</sup>Id. at 158.

## Insist on Objective Criteria

The concept of "principled negotiation" relies on the premise that negotiation results will be based on some objective standard. The authors contend that decisions resulting from positional negotiation where no objective criteria is taken into account, tend to be costly, arbitrary and unwise.<sup>25</sup> The outcome of positional negotiation can rely solely on "two human wills battling for dominance." According to Fisher and Ury, the results of negotiation should be independent of will; objective criteria should be the standard for judging the fairness of a mutual decision. The authors assert that efficiency, scientific merit, precedent, community practice and other standards of fairness are less vulnerable to attack, remorse or repudiation. Further, the participants contend with the merits of the problem rather than with themselves.

The authors also provide guidelines for negotiating with objective criteria. They suggest that the negotiator frame the issue so as to inspire a joint search for objective criteria. Using standards proposed by the other party, when possible, is one means to this end. Alternatively if their suggested standard seems unacceptable the negotiator should consider having an objective third party decide which criteria are most fair. The negotiator should never yield to pressure, only principle. Where the other party refuses

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<sup>25</sup>FISHER and URY, supra note 1 at 85.

to compromise the negotiator should first reevaluate her own position to see if some objective criteria which makes the other's position fair has been overlooked. If no principled basis can be found for accepting that position the negotiator can attempt to shift the discussion from what the other side is willing to do to the question of how the matter should be decided.

This approach of insisting on objective criteria was also applied at the Cancun Summit. The fundamental position asserted by developing countries at the Cancun Summit was that Third World nations should have an equal voice in the control of international economic institutions, such as the World Bank and the International Monetary Fund (IMF).<sup>26</sup> These institutions follow a Hamiltonian system of proportional representation based on wealth. Consequently, the western industrial world holds hegemony and veto power. Economic control over member Third World nations is thus maintained through this institutionalized standard. In this instance, the use by Third World countries of the western standard is ill advised. And no "third party" exists to objectively decide whether the proportional representation system is fair. In an effort to address this problem, Summit co-hosts, Canadian Premier Pierre Trudeau and Mexican President Jose Lopez Portillo simply returned to the question of how Third World development should be decided. They

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<sup>26</sup>P. Lervoux, Can the Haves Meet the Have Nots Halfway? 233 NATION at 403, 405 (Oct. 24, 1981).

obtained agreement to pursue development negotiations at the United Nations where each country had one vote, despite the U.S.'s demurrer on this consensus.<sup>27</sup>

#### Best Alternative to a Negotiated Agreement (BATNA)

Roger and Ury suggest that the negotiator's best alternative to a negotiated agreement is the standard by which any proposed agreement should be measured. The negotiator's strength depends primarily on how attractive the option of not reaching an agreement is to each party. Consequently, the BATNA is essential to wise negotiation. The better the BATNA, the greater the negotiator's power.

The BATNA is distinguished from a "bottom line" in positional negotiation. The authors concede that formulating a "bottom line" may make it easier to resist the temptation of the moment to accept a less than equitable or unfavorable agreement. However, having a "bottom line" limits the negotiator's ability to benefit from what has been learned during negotiation, since a steadfast position has already been taken. Entering negotiations with a "bottom line" reduces the incentive to create a tailor-made solution with mutual gain to both parties. In addition, a "bottom line" is often an arbitrarily chosen figure and is not an accurate measure of the parties' interests.<sup>28</sup>

On the other hand, a party's best alternative to a

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<sup>27</sup>Gaps and Links, 108 Commonwealth at 614 (Nov. 6, 1981).

<sup>28</sup>FISHER and URY, supra note 1 at 103.

negotiated agreement is developed by inventing a list of actions the party might take if no agreement is reached. Promising alternatives that are discovered during the course of negotiation can become practical options from which the best can be chosen. Because a BATNA incorporates information elicited during negotiation, it reflects the merits of the problem better than a "bottom line." Consequently, it is more likely to also address the interests of the other party and is less likely to be arbitrary. For these reasons the BATNA is a viable alternative to a "bottom line."

A BATNA would have been a preferable approach for Third World countries to take if dialogue had proceeded to this stage. Ideally, promising options would have been discussed by the parties and many concerns would have been addressed. Conversely, the western block may have benefited more from sticking to its "bottom line" in light of its greater bargaining power and its hard sell position. The question then arises of whether an agreement could have been reached if the North used a positional bargaining approach while the South advocated principled negotiation techniques.

### Conclusion

Although Getting to Yes may be criticized for its simplicity in legal circles, the authors did not intend to provide a technical negotiation manual for use by the professional. Nonetheless, their primer does significantly increase the negotiator's options. By dissecting the parties' positions and scrutinizing these smaller interests

from different perspectives, many more options become apparent. It is an approach that Roger Fisher has proposed in past works (e.g., in his discussion of issue control).<sup>29</sup> Other negotiation experts have also alluded to the possibility of utilizing conflicts in positions to derive critical interests from them, then creating previously unanticipated alternative solutions.<sup>30,31</sup>

Most importantly, Fisher and Ury have challenged the conventional negotiating tactics of which most practitioners are well aware. Techniques such as outnumber the other side, arranging meetings on your own turf, and "locking yourself in" (bluff) have all been abandoned.<sup>32</sup>

Greater advantage can be obtained through the use of more rational rules or through negotiation which focuses on the merits. Most negotiators may be reluctant to play by these new rules. They utilize the concept of fairness, objective standards and principles. But according to Fisher and Ury it is precisely this use of equitable standards which makes the method difficult to disregard. The stronger the other side appears in terms of physical or economic

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<sup>29</sup>R. FISHER, FRACTIONATING CONFLICT INTERNATIONAL CONFLICT AND BEHAVIORAL SCIENCE: THE CRAIGVILLE PAPER (1964).

<sup>30</sup>M. Deutsch, Conflicts: Productive and Destructive, Journal of Social Issues, p. 71-41 (1969).

<sup>31</sup>R.E. WALTON and R.B. McKENSIE, A BEHAVIORAL THEORY OF HALOR NEGOTIATIONS: AN ANALYSIS OF A SOCIAL INTERACTION SYSTEM (1965).

<sup>32</sup>Meltsner and Schrag, Negotiating Tactics for Legal Services Lawyers, 7 Clearinghouse Review p. 259-263 (Sept. 1973).

power, the more you benefit by negotiating on the merits.<sup>33</sup> For these reasons the implementation of "negotiations on the merits" at Cancun would have greatly benefited the interests of Third World nations. But whether principled negotiation can be used effectively in a setting where the other parties insist on positional bargaining will most certainly be the factor determining its success.

Another determinant will be whether it can be effective where the pool of identified interests provide no shared or compatible interests between the parties. The answer to these questions may determine whether Getting to Yes can replace the traditional "positional" method of negotiation and gain respect among professional negotiators.

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<sup>33</sup>FISHER and URY, supra note 1.