

What Does it Mean for
Nations to "Negotiate in Good Faith"?

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ABSTRACT: Negotiating in good faith is an international norm and in some cases a treaty requirement. This paper tries to define the normative meaning more precisely. The aim is to help leaders avoid giving an incorrect impression of bad faith, especially in cases where groupthink may induce one to miss the questionable parts of one's action. A source for the discussion is U.S. labor law, which requires good faith negotiations between union and management. The law contains puzzles whose solution leads to a correct definition. For example it is explicit that it does not require parties to make any concessions, but it does require bargaining and employers have been declared in violation for using take-it-or-leave strategies, but how can a party bargain without making concessions? The final definition is a mutual intention to negotiate an agreement using reasonable negotiating strategies. The key is in the clarification of the terms like "reasonable" and "negotiate." The definition fits many international disputes where parties raised accusations of bad faith.

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INTRODUCTION

In rough terms, negotiating in good faith means negotiating in a way that is likely to yield an agreement. Bad faith means just going through the motions for the sake of appearance, or even making moves to spoil the process. The accusation of bad faith came up in July 2000 as the Camp David meetings over the Middle East peace process were about to break up. Premier Ehud Barak wrote a letter to President Clinton, for release to the press, stating that Yasser Arafat was not negotiating in good faith as he was not prepared to compromise on the substantial issues. The Palestinian representative in Washington, Hassan Abdel-Rahman, charged Israel with bad faith for being more interested in negotiating "with the Israeli right-wing than with the Palestinian delegation." There are rhetorical motives here, but there are also substantial issues. A leader who expects to pay a domestic price for offering concessions, as Barak did, will first judge whether the other side is disposed to make no agreement at all. Another issue around good faith negotiation involves Taiwan's status. If Taiwan refused to come to the table that would spark a crisis, as would making negotiating moves that suggest an attempt to avoid an agreement (Charney and Prescott, 2000).

United Nations bodies regularly call for good faith negotiation to settle specific disputes. On January 12, 2001, for example, the Security Council urged Yugoslavia and Croatia to negotiate in good faith their dispute over the Prevlaka Peninsula. The International Court of Justice was more specific about the elements of the concept in a 1997 case concerning Yugoslavia and Hungary and power generating facilities on the Danube (Becker and Oxman, 1998). The states should solve certain issues by negotiations in good faith, it said, evidence of that being their willingness to contemplate the other's proposals, avoid preconditions, and accept help from third parties. The Canadian Supreme Court interpreted international law to mean that for an ethnic people to secede in law from their governing country, they must first attempt to negotiate their complaints in good faith.

It is required by some international treaties, such as the Nuclear Non-Proliferation Treaty, by which the nuclear parties committed themselves to the good faith pursuit of negotiations on ending the nuclear arms race and achieving nuclear disarmament. In the 1972 Biological Weapons Convention states promised to continue negotiations in good faith for a parallel treaty on chemical weapons. In other agreements, good faith is unmentioned but implied. In the SALT I, SALT II and START treaties, parties undertook to continue negotiations on arms control, and within the Biological Weapons Convention they were to "cooperate" to resolve compliance disputes. That section was cited when an outbreak of anthrax in the Soviet Union suggested it had violated the treaty. Both promises can be interpreted as commitments to negotiate in good faith (Koplow, 1993).

The difficulty has been just how to define good faith negotiating and how to recognize it. This paper will work toward a more precise definition. The focus will be on the normative

aspect rather than the legal question. Good faith is a bargaining norm, in that negotiating partners expect it, and if they do not get it they tend to react against the violator, as the Israeli and Palestinian delegations did. Treating the idea as normative and non-legal is quite rare. A past example is Iklø (1964), but he was a resolved skeptic, offering four definitions, refuting each one, and coming to no conclusion. Legal decisions will be a guide to the meaning of the term, and American labour law will be especially relevant, but the normative and legal approaches are separate. Legal definitions have tended to be summaries of case law, and when judicial bodies have specified bad faith behaviours, they have sometimes been influenced by a social policy goal such as maintaining workers' rights. Legal definitions also have to integrate the concept with laws that overlap it, such as those against unfair labour practices, so the definitions can become complex and less focused on a core meaning.

The definition will aim at simplicity and unity. It is meant to be useful in a debate in which one partner tries to persuade another who is taking actions tantamount to bad faith. Also, a party who understands the definition might avoid doing something that would give the impression of bad faith. The first section, then, will describe the concept in American labour law. The next section will work out a definition of the norm of good faith, and a final one will show how it applies to some past international allegations of bad faith bargaining.

UNITED STATES LABOUR LAW ON GOOD FAITH NEGOTIATION.

The general concept of good faith has been used in national laws since its beginnings in ancient Rome (O'Connor, 1991), but its application to negotiation has been less extensive. To a degree, negotiating in good faith is like acting in other ways in good faith – it is doing what one purports to be doing, as required either by some duty or voluntary undertaking. To make a good faith effort to locate minority candidates for a job is the opposite of making moves on the surface while planning something else. To carry out a contract in good faith means to do in substance what you said you would. However, the difficulty for the concept in negotiation is that nothing has yet been agreed to. Clarifying the term will largely involve clarifying what it means to “negotiate.”

The concept of good faith negotiation comes up especially in the federal laws of the United States, Australia and New Zealand, but it is the American case that I will discuss here since it has dealt with many more disputes. U.S. law does not require that all negotiations be in good faith (in contrast, for example, to its general requirement that contracts be carried out in good faith.) There is nothing illegal entering negotiations on a house just for curiosity, or visiting a car dealership in order to practice one's bargaining. Some behaviours are illegal that would be illegal in contexts outside of negotiation, such as fraud, negligent misrepresentation or inducing detrimental reliance on a promise, and others invalidate the contract, but good faith is not generally required. It is imposed only in certain contexts of

negotiations, where the public holds an interest in the parties reaching an agreement, such as telephone and railway service.

The broadest requirement is established by the National Labor Relations Act of 1947, the Taft-Hartley Act, which obliges employers and the union's representatives,

"to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession."

Violations of this provision may be reported to the National Labor Relations Board, which over the years has had to interpret the phrase "confer in good faith." Its decisions have sometimes imposed restrictions on unions, but more often it has been management that transgressed.

Some specific practices are taken as indications of bad faith include:

- * Making patently unreasonable bargaining demands, such as refusing to give in on small matters that are standard practices in the industry – the ability of the union to use the factory bulletin board;
- * Unilaterally changing conditions that are mandatory subjects of bargaining (wages, hours, working conditions) when negotiations are not at an impasse;
- * Appealing directly to employees in ways that undermine the union as their representative, e.g., by intense publicity campaigns during the talks, asserting that the union is not promoting the workers' interests;
- * Not designating an agent with sufficient bargaining authority;
- * Withdrawing an agreed-upon provision when an agreement seems close;
- * Refusing to conclude an agreement when the sticking point is outside the mandatory subject of negotiation, i.e., not a matter of working conditions, hours or wages.
- * Refusing to make proposals, or to say what is wrong with the other's position;
- * Refusing to provide information to support one's bargaining claims;
- * Unreasonable scheduling or delaying of meetings;
- * Refusing to sign that has been reached verbally.

It is not clear on the surface how these relate to one central concept, but it will be shown that many of them have caused problems in international negotiations as well. Although they were held to violate the quoted section of the Act, they did it in different ways. Some seem to involve a refusal to negotiate at all, some involve a negotiation but not with the union or not one focused on the significant matters, and only some involve a negotiation but one that was not in good faith. The approach of the definition below, however, is that these ideas cannot really be separated – in order to know what good faith negotiation is, one has to define negotiation.

Note that “hard” bargaining is not banned. Consistent with the idea that a party is free to make or not make a contract, the law, as quoted earlier, explicitly says that one need not agree to a proposal or make a concession. How one can bargain without making concessions is a challenge for a coherent definition (Hylton, 1994.)

A DEFINITION

A skeptic might say that negotiating in good or bad faith cannot be given a short definition, that it has to take the form of a list of forbidden behaviors. Summers (1968) have taken this position in the legal debate about fulfilling a contract. However, the list approach should be the last resort, taken up only if no definition seems to work. For a diplomat or leader to argue for good faith behaviour, especially across cultures, a simple definition is more compelling. Even a long list would probably be incomplete, and if a thorough one could be found, it seems unlikely that its items came together under the title of good faith by a semantic accident; there should be an underlying pattern.

Good faith negotiation as a joint duty

A early definition, which reflected case law to that point, was given by Archibald Cox (1958, 1416), who later became famous for his role in the downfall of Richard Nixon.

Definition of good faith negotiation (Cox’s version): Each party “must engage in negotiations with a sincere desire to reach an agreement and must make an earnest effort to reach common ground ...”

However, this cannot be taken literally. Almost no one arrives with an intention of rejecting all agreements, including those that would be wildly favorable. This problem will be fixed in the final definition, but the immediate focus will be on another change, to refine the setting of the definition. Cox puts a constraint on each party individually, but here it is proposed as applying to the parties collectively. In contrast to other good faith activities like fulfilling a promise or performing a professional duty, negotiation is a cooperative activity, so the definition imposes a *joint* obligation. A joint obligation is more than a set of single obligations. In it both parties have to follow a certain course, they expect each other to do so, and it makes no sense for one to follow it if does not expect the other to. If the other is not bargaining in good faith then a reasonable agreement is impossible, and there can be no obligation to intend something when one knows it will not happen. One can imagine a negotiator saying, “I’m negotiating in good faith, but they aren’t,” it would be more accurate to put it, “I’m *ready to* negotiate in good faith, but they aren’t.” The situation is similar to one where parties recognize that they have reached an impasse; they are then free to stop negotiating (Murphy, 1977). Accordingly the definition will place the obligation on the parties as a pair, (for simplicity here I will talk as if there are only two of them), and it will require a “mutual intention.” Many intentions are conditional – “if it rains, I intend to

rent a video” – and *a mutual intention* involves a set of parties with intentions to do a joint action, the intentions being conditional on each other:

Definition of a mutual intention: A group of parties has a mutual intention to perform some action together, when each holds the intention to do its part conditional on a belief that the other holds the mutual intention, and in fact each has that belief.

The joint obligation/mutual intention approach is especially appropriate in the international context. In labour cases, typically one party wants the other to come to the table, but in many international situations neither leader wants to bargain and the call to negotiate is directed to both of them. The non-nuclear nations demand that the nuclear powers pursue a treaty, for example, but suspect that none of them really wants to give up its prized weapons.

A first pass at a revised definition is:

Definition of good faith negotiating (first version): Parties negotiate in good faith if they hold a mutual intention to negotiate an agreement.

Objection: some possible agreements cannot be reached by any reasonable bargaining strategy.

The definition needs to be refined, however, to require holding the intention only conditional on the agreement being achievable. An agreement may be impossible because of the parties’ goals, as in a situation where the owner values the car more than the potential buyer, but it can also be impossible because of the structure of bargainers’ knowledge, even when there is a zone of mutual advantage. They have no way to convince the other of the privately known facts. A famous example is the so-called “market for lemons,” (Akerloff, 1970). A car’s owner, Olga, knows its condition and values it at \$4000. The potential buyer, Brad, is unsure how much the car is worth to him – it could be any amount from \$0 to \$15000, and he assigns equal likelihood over the range. Also, he knows that it is worth 50% more to him than to her. There is no reason for Brad to believe what Olga tells him about its value, it is assumed. A deal is possible in principle: if Brad gave her \$6500 they would both would gain, but for him to make that offer, or any other, is not sensible.

The reason is that no matter what Brad offers, he knows that he will benefit only if she accepts. But if she accepts that will give him more information about the car, causing him to lower his estimation of it. In fact as the numbers work out, he will lower it so much that he will regret making the offer. If, for example, she accepts a \$4000 offer, he will conclude the car is worth something between from \$0 to \$4000 for her, and therefore \$0 to \$6000 to him. Thus on the average it will be worth \$3000 to him, and he has probably made a bad deal. This calculation can be repeated for any offer he might make, so that any offer higher than zero is ill advised. (This argument here has assumed a single final offer, but multiple

offer schemes to probe her private knowledge work no better, since she would be smart to say no to any of them before the final offer.)

A deal was there for Brad and Olga to make but one cannot blame them discussing offers. Thus the definition needs a phrase “if that agreement is possible.” Whether a deal is “possible” is an intricate question and depends on the bargaining method used (Myerson and Satterthwaite, 1983; Myerson, 1991), and no bargaining method is universally best. Thus the idea of possibility must be made contingent on their strategies.

Definition of good faith negotiating (second version): Parties negotiate in good faith if they hold a mutual intention to negotiate an agreement, if one is possible given the situation and their negotiating strategies.

What counts as negotiating?

One element in the definition needs clarification – what is negotiation? A noted case came to a U.S. federal court in 1969, involving General Electric and its union. The company’s labour strategy had been set by its former vice-president Lemuel R. Boulware: before the contract talks it surveyed its employees to find what they wanted and expected, and drew up a proposal that it saw as reasonable and even generous. It presented this as take-it-or-leave-it. The union was welcome to correct any details that the company had overlooked, but in the role of an advisor not a negotiating partner. During the talks the company carried out a publicity campaign to convince the employees that its offer was reasonable and in their interest.

The approach acquired the negative label of “boulwarism,” but G.E.’s view was that it was preferable to back-and-forth bargaining, which it saw as harming its relationship to its workers. Since the final outcome would lie between the two initial offers, G.E. argued, the company’s first offer would have to be one that it saw as unfair to the workers, in order to end up at an appropriate position. The company would appear ruthless, and the union would get credit for dragging it to a fair bargain.

However, the NLRB and later the Circuit Court saw boulwarism as a refusal to bargain (*Labor Law Reports*, 1964; *Federal Reporter*, 1969). The problem was not that the company refused to make concessions – the Taft-Hartley Act allowed that -- rather that it had set up the situation to prevent it from making any concessions, even reasonable ones. It is one thing to be stubborn, another to adopt a policy of stubbornness and go on to publicize this policy for the sake of burning one's bridges.

Comparing boulwarism with Cox’s “sincere desire to reach an agreement” definition, General Electric was in good faith. It would have been happy to have made an agreement, it just decided to achieve it by a route other than negotiation. Boulwarism is not a form of negotiation, no more than auctions or binding arbitration. To understand why not, one must

analyze what are the minimal elements of a negotiation. The thesis here is that it involves free communication among the parties, back and forth, ending with voluntary decisions whether or not to make an agreement.

First, negotiation involves *communication*. Through the work of philosopher Paul Grice and later writers, communication can be interpreted in a strict sense (O'Neill, 1999), giving in turn a strong meaning to the negotiation concept. It is more than the transfer of information. It involves an act by one party, the sender, intended to make the receiver believe something or do something. Also, the receiver has to come to that state of belief or action by recognizing the sender's intention in making the communicative act. If you see me leave my house with a suitcase, you may infer that I am going on a trip. Perhaps I wanted you to infer it, and that is why I did it. However, my action is not communication. For that, you must at least know that I intended to communicate. Communication occurs when we assert things to each other, or ask questions, or make verbal requests, but it can also occur outside of language, by non-linguistic actions including symbolic messages (O'Neill, 1999). (Negotiating might also call for actions beyond communication such as producing proof that one's claim is true. These are not necessary by definition but follow in some circumstances from the idea that the intention is to produce a possible agreement.)

A second condition for negotiation is that *communication occurs relatively freely among the interested parties*. This distinguishes it from arbitration and auctions, but not from mediation, since the communication might be indirect. A third is that the *communication is repeated*. A single offer with a response is not sufficient. A fourth condition is that its goal be a *joint binding agreement by the parties*. The fact that it is an agreement among the parties, thus voluntary, again differentiates negotiation from arbitration. The binding aspect is important – a bargainer who intends to verbally agree with the other but not sign anything for fear of being held to it, has not been negotiating, and the NLRB has proscribed this practice. Since the agreement is voluntary, the agreement should be in the parties' mutual interest, with "interest" understood in a broad sense, to include a negotiation that goes forward due to a promise to others. Summarizing,

Definition of negotiation: Negotiation involves interested parties engaging in back and forth communication with each other, with the intention of voluntarily making a binding agreement, if one is possible.

Reasonable negotiating strategies

Another modification must be made. For all that has been said so far, General Electric could argue for its take-it-or-leave-it style as constituting negotiation. It was willing to listen to the union and to go discuss minor modifications that it might have overlooked. A further refinement is that the negotiating strategy has to be "reasonable" in a certain sense. Here reasonable means reasonably efficient and reasonably fair. It is efficient because it promotes an agreement. A test of fairness is the application to a situation where all parties

use the same strategy. It should work in that case. A negotiating strategy is unfair if it does not reach agreements only when the other uses it too. . The central idea is that negotiators are equals, at least a priori, and neither one can claim a special status, e.g., to be the proposer insisting that the other be the acceptor. (The fact that negotiation implies equality in some sense has often induced states to refuse to negotiate with rebel or secessionist groups.)

To define a reasonable negotiating strategy, we first define a negotiating strategy as a rule telling you what to do as a function of your beliefs, interests, and what has happened in the negotiation up to that point. The argument then leads to:

Definition of a reasonable negotiating strategy: A reasonable negotiating strategy is one, which is relatively likely to produce an advantageous agreement, if one is possible, when used by all the parties to the negotiation.

The basic problem with bouldwarism is that it is “self-inconsistent.” If both G.E. and the union used it, they would sign a contract only if their senses of fairness were at least as generous to the other as themselves, but this is a rare event in labour relations.

THIS DOES NOT MEAN THAT THE DEAL HAS TO BE EQUAL, THAT A POWERFUL PARTY IS FORBIDDEN FROM USING THAT POWER. THE EQUALITY IS ENTIRELY PROCEDURAL, NOT A MATTER OF CONTENT, SO IF I CAN GET 99 cents out of the DOLLAR THERE IS NO GOOD FAITH OBJECTION TO THAT PER SE.

A final issue has to be discussed on the question of reasonable strategies. Suppose that the negotiators came with different strategies, both reasonable. Their strategies would reach a bargain used against themselves, but tend to fail when cross-matched. In arms control talks, the Soviet Union often wanted to first establish general principles and then work down to the details. American negotiators wanted to face the details immediately. Neither party might want to switch; it might see itself as doing better letting the other switch. This problem can be solved using the definitions as they stand. A negotiating strategy has been specified as telling its user what to do as a function of whatever the other does, and this includes the case that the other does not use the same strategy as oneself. Their joint duty to bargain in good faith calls on them to use strategies that do well against another’s different strategy if possible, to resolve differences in spite of the overall approaches. They may wish to negotiate over negotiation approaches, and compromise, or they may wish to let their different behaviours stand and hope for success. Often the disagreement in strategies is settled by precedent. A bazaar merchant who initially wants \$100 for a \$20 item is using a reasonable strategy in context. However, if one puts a \$200,000 house on the market with an initial demand of \$1 million, that will be taken as non-serious. The context determines expectations of which is appropriate to use.

A further element of a strategy being reasonably efficient involves sincerity. Many speech acts arise in the bargaining interaction – questions, assertions, offers, promises, etc. -- and these should be made sincerely. One should ask questions because one wants to know the answer, make only offers that one will follow through on if the other accepts, and avoid assertions that one knows to be false.

This might seem too restrictive. One often hears Henry Wotton's description of a diplomat as an "honest man sent abroad to lie for the commonwealth." However most experienced diplomats say otherwise. Sir Harold Nicolson states that one must not only avoid misrepresentations, but if a misunderstanding is conveyed inadvertently, one must do one's best to correct it. In fact, leaders often cite lying about the facts or taking back offers made as signs of bad faith.

There is no requirement of perfection here. Good faith is a matter of degree, an ideal, so one acts in relatively good faith by being relatively sincere. Also, Sincerity is different from complete openness, and the latter would be asking too much of a negotiator. No one should reveal their true walkaway position. This is not expected so that even if they did reveal it the other would not be sensible to believe it. Negotiators need to tell the truth, but not the whole truth. The limits of openness in good faith is clarified by U.S. labour law, which seems to have followed the pattern that the information required to be revealed must be credible in its revelation. A company must sometimes reveal its financial records, but not its president's state of mind. Parties must reveal data only if it is the basis for a negotiating claim. If management simply says it will not accept a union demand, it need not reveal anything, but if it says that it "cannot afford" the demand then it must open its books to establish that fact. This openness aspect of good faith follows from the need to follow a reasonable strategy and is not connected to sincerity. If someone makes a claim favorable to themselves which they can prove, but refuses to prove it, they are not really trying to convince the other and evidently do not want an agreement.

The law also calls for revelation when the other party needs the information to devise its counterproposals. The union may need the relative costs to the company of its different pension schemes in order to be a relevant negotiating partner. This aspect of openness follows from the idea that a negotiation involves a mutual intention to try to agree, so that the parties must cooperate in keeping it moving. Again good faith does not require wholesale openness.

The final definition

The final version is the following. (Terms that have been given a special definition or a clarification are in bold.)

Definition of good faith negotiating (final version): Parties negotiate in good faith if they use **reasonable negotiating strategies** implemented **sincerely** with the **mutual intention to negotiate** an agreement, if that agreement is **possible.**”

INTERNATIONAL EXAMPLES

The definition can be compared with events where there were attributions of bad faith internationally, or a problem caused for that reason. I will not question the facts as the accusers saw them – the issue is only whether their allegation fits the definition.

During the Camp David talks, as mentioned in the introduction the Palestinian representative claimed that Barak was not negotiating in bad faith and was more concerned with dealing with Israel’s right wing. Within the definition this would be an appropriate statement if it applied to the government of Israel as a whole, but not to Barak, who was in a chain of negotiations and may have been doing his best with those he was facing at home. His coalition in the Knesset was fragile, and he was unable to make certain concessions without losing his position. But if one can regard Israel as a negotiating entity and if it has no firm intention to make a deal, it can be accused of bad faith.

In situations involving states with distributed power, i.e., with different interest groups in competition, there is often a motive to negotiate only on the surface. In 1981 Britain had agreed in a memorandum of understanding that the Falklands/Malvinas would eventually be turned over to Argentina, but domestic developments in Britain made an agreement less politically attractive. Argentina concluded that Britain was stalling, and on March 1 put out a statement that unless negotiations were concluded promptly, it would solve the matter by "the procedure that best accorded with its interest" (Perez de Cuellar, 1997). A lesson of the subsequent war is that surface bargaining, the essence of bad faith, goes against a norm and can produce a strong response.

(Two analyses claiming that states simply wanted to be seen as bargaining but not to agree are Dukes, 1985, on Britain’s bad faith in its 1939 dealings with the Soviet Union on an alliance against the Axis, and Matthews, 1979-1980, on Ian Smith’s insincerity on a transition for Rhodesia.)

In May of 1982 UN Secretary General Perez de Cuellar attempted to mediate the Falklands/Malvinas dispute, but a week later Britain increased its blockade of the Argentinean coast to twelve miles. The Argentinean government denounced it for lack of good faith since it was participating in mediation while taking further steps to win by force. Mediation is a form of indirect negotiation and requires good faith, and the principle invoked here is an important one in both settings. Having agreed to negotiation or mediation, one should pursue a resolution within that framework and not by outside unilateral actions. This idea is congenial to American labor law, which forbids unilateral changes in the important subjects

of the negotiation unless the parties have reached an impasse. How does the idea fit the present definition? Three objections against such actions can be made. Sometimes companies have raised wages during the negotiation as an attempt to buy workers off and get around the union. These unilateral actions go against the company holding an intention to agree with the union if possible, and so are in bad faith. However this objection does not apply to the British action. A second objection is that Britain's act clearly harms trust and increases tension, and in this way manifests a lack of intention to negotiate. Closest to the British and Argentinean situation though is a third objection from the definition. The Taft-Hartley Act has been taken to imply that wages and working conditions are to be determined mutually determined by negotiation. The point of good faith negotiating is to bring about a resolution "by negotiation" according to the definition. Having agreed to start the process, unilateral actions without new special circumstances are in effect backing out of it.

Parties have often projected bad faith inadvertently. In the fall of 1962, Arthur Dean, the US ambassador to the Geneva arms talks, flew to Moscow to discuss a comprehensive nuclear test ban. The discussions up to then had stalled on verification, Nikita Khrushchev wanting only three on-site inspections a year, but John Kennedy, constrained by hawks in the US Senate, insisting on a greater number. Whatever Dean said to Khrushchev, he must have made him believe that the United States was now ready to accept the lower number. In December Khrushchev sent Kennedy a letter including an appreciation that he had shifted his position, but Kennedy wrote back that he had not, that he would need eight to ten inspections yearly. Khrushchev was furious, according to Lawrence Freedman (2000), as he had worked hard to get the Soviet military to accept the deal, and faced Chinese criticism for his coexistence approach. Norman Cousins, the publisher and peace advocate, visited Khrushchev in April and tried to convince him that there had been misunderstanding. Taking back an offer when it is accepted is typically bad faith. Doing so gives an advantage to the offerer in that it learns more about the other's bottom line, but the practice gives the offeree a disincentive to accept even favorable offers, for fear they are just tests. It violates the definition because it involves an insincere speech act, part of a negotiating strategy that would never work against itself.

As a final example, Jimmy Carter had campaigned against Henry Kissinger's approach to foreign policy, and as the new president he decided to develop proposals for the Strategic Arms Limitation Talks that swept aside and went beyond what had been negotiated up to that point. When he was criticized for keeping his new proposals secret, he publicized them before presenting in Geneva. The Soviet reaction was strong and negative, both to the proposals and to the publicity, and negotiations were soured for months. SALT II would take many years to be signed, and, because of the growth of an opposition movement, it would never be ratified. The delay from Carter's mistake may have contributed to that. The definition says that negotiation is a joint activity. What has been negotiated with a partner has at least to be unnegotiated with that party. Also, the Soviets saw his publicity as an

appeal to world opinion, which would put pressure on them to yield, again circumventing the normal process, akin to Britain's unilateral action in the 1982 war.

CONCLUSION

One legal scholar who wrote on good faith negotiation was Robben Fleming (1961), then a labour mediator and later president of the University of Michigan. An event in Ann Arbor showed the intricacies of good and bad faith. One night a graduate student passing by his house took the notion to knock on his door. He told Fleming that demonstrators were assembling on campus and would soon be coming over to present their demands. What was he going to do, the student wanted to know? Fleming invited him in, offered him coffee and told him his plan. He would greet the demonstrators. First, the leader would speak, and he would be speaking for a long time. Fleming would listen for as long as it took and not argue. In fact there would be several leaders that Fleming would be listening to, and each of them would also be speaking for a long time. After that, Fleming said, he would deliver his response and he would continue at length and he would be boring. The demonstrators arrived, and the student watched events play out as foreseen. When the leaders finally went home they were by no means the first ones to leave.

Fleming's scheme worked. It was part of his goal, successful in the long run, to maintain civility at the university by keeping the police off campus. His negotiations with the demonstrators were in bad faith, strictly speaking, but that caused no problem. However, this is very much an exception. More typical are statesmen who have gotten into trouble by doing the reverse, by inadvertently and incorrectly projecting bad faith, by doing something that seems right to them but only from the human tendency to be more generous in accepting one's own morality and reputation for honesty. It would be useful to have a statement of the norm, simple enough to use as a guide.

The definition offered here seems to be a good start on accuracy. It focuses on the reasonableness of one's negotiating strategy, as determined by its success in reaching agreement when used against itself; on negotiation as a joint activity requiring "mutual intentions"; and on a definition of negotiation as back and forth communication with the aim of an agreement voluntarily undertaken. Parties acting inconsistently with these elements are negotiating in bad faith. Since it relies on a series of subdefinitions and special meanings, it may be too complex for purposes of convincing leaders and reinforcing the norm to negotiate. However, it may provide a clear and full understanding of the concept from which scholars may work.

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