

NEGOTIATING STRATEGY AND TACTICS

by

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Objectives

- The nature of negotiation has been the subject of judicial findings. Thus, '*The parties) are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement. The parties are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case if either of them insists upon its own position without contemplating any modification of it.*' (per the International Court of Justice in the North Sea Cases, 1969).
- Overall aim: As with any negotiation, to achieve the best outcome for your side which is acceptable to the other. According to Satow's classic *Guide to Diplomatic Practice*, '*There are few more rewarding things in diplomacy than a successful negotiation...from which both...parties derive some satisfaction. For mutual satisfaction is the best guarantee of permanence.*'
- Specific aim: To establish a maritime boundary which, meeting the security, political and economic interests of the states concerned, is accepted and respected over the years. The two sides may have different interests or priorities. Robert Frost wrote '*Good fences make good neighbours*' and this applies also to neighbouring countries, both on land and at sea. Good, agreed boundaries help to remove a possible source of friction, or even disputes, in future, e.g. over licensing of activities at sea such as fishing or drilling.
- All-purpose, single maritime boundary best. Clean-cut, final agreement. All maritime activities can be licensed or regulated by the coastal state, subject to and in accordance with the rules of international law. In particular, the fishing fleet or the oil and gas industry can proceed without further ado.
- Possible to have different lines for different purposes, but unusual and raises problems in day to day practice. May well need management commission or annual meetings to review practice or resolve conflicting uses/jurisdiction.
- Possible to have agreed stretch(es) of boundary and a joint area where agreement on a single line proves to be impossible. But second best solution. Don't start with that objective in mind. Keep at back of mind. Fall back when all hope of finding a single line has gone.

- Consider whether to go for a comprehensive settlement or just agree on part of an eventual longer boundary. Where the two sides have more than one outstanding boundaries, you should consider whether to seek to agree two or more boundaries in the same negotiations or to take them singly (less chance of cross-boundary trade-offs).
- Resource interests paramount. (1) Non-living resources of the seabed or the subsoil: Oil and gas (Gulf, North Sea). Sand and gravel (southern North Sea). Aragonite (Caribbean). Alluvial minerals (off Namibia). (2) Living resources of the water column or seabed: fish (Jan Mayen case, Greenland-Iceland agreement), including crustacea (France-Jersey negotiations). Ownership of particular fishing banks (Grisbadarna case, Gulf of Maine case).
- Other interests in the area: (1) Navigational interests, including access and environmental protection, especially channels through the territorial sea giving access to a port (Belgium-Netherlands). (2) Security, especially in the territorial sea. States do not like to feel hemmed in, or cut off in some way, by neighbours' zones. (Anglo-French arbitration; Ireland-UK boundary).
- In general, each side may be expected to wish to see the boundary placed as far as possible away from its coast, giving it the largest possible area of maritime jurisdiction. To misquote George Orwell, 'all areas are equal, but some may be more equal/desirable than others.' Knowledge is available where fishing is concerned. Knowledge of oil and gas prospects often incomplete because lack of an agreed boundary has inhibited exploratory work by the industry. Best to assume that all outstanding areas are valuable: 'there's probably nothing there' is a dangerous attitude for a negotiator.
- Interests or priorities of the two sides may differ: e.g. one may be interested in access for its fishing fleet, the other in oil and gas licensing. Opens up possibilities for trade-offs between interests. Assists each side to 'sell' the proposed agreement to domestic interests.
- Extra possibilities in those cases where two states have two different boundaries on two different coasts to settle. Strategic decision whether to negotiate two together (Ireland-UK in Irish Sea and west of Scotland) or separately (France-Spain in Bay of Biscay, but not in Med.).
- Avoid linking boundary negotiations to other current negotiations or extraneous political problems (Ireland-UK re Northern Ireland). Boundaries are for an indefinite time, i.e. long term. Best to settle boundaries on the basis of factors concerning boundaries, not other considerations- especially short-term ones.

- Choose time when political relations are good or normal. Avoid times when short-term political problems exist. Although boundaries are to be established by agreement (LOS Convention), there is no deadline for starting or finishing negotiations.

Initial contact

- Prepare thoroughly. Study the geography of the boundary area, the material interests of both sides, the maritime legislation applying to the area to be delimited. Ascertain the relevant baselines of the two sides. Are there any disputed islands or features (e.g. low-tide elevations) the political or technical status of which is uncertain? There is a working hypothesis that small features lying within the territorial sea belong to the coastal state in the absence of any known claim by another.
- Where disputed or indeterminate sovereignty over small islet, it is best to resolve the question before concluding boundary agreement (UK-Venezuela 1942: Island of Patos ceded as part of wider boundary agreement in Gulf of Paria; UK-US Virgin Islands, Flanagan Island; Hanish Islands arbitration in two phases). Contra: Hans Island in Davis Strait, Canada-Greenland, where sovereignty left open.
- Form a view on which system of law is applicable: customary or conventional? Is there a land boundary treaty and, if so, does it make any provision for the sea? Are the Geneva Conventions on Territorial Sea and on the Continental Shelf in force between the two parties? Or LOS Convention, articles 15, 74 or 83?
- Form a team and work out a negotiating brief. Appoint a leader who would do most of the talking, assisted by other members who have defined roles. Obtain clearance for the brief and for what you are proposing to do at the first meeting.
- Arrange an opening session lasting only two days, allowing two or three meetings with breaks between meetings for consultations with your team.
- Avoid trying to do too much at the first meeting, especially if there has been no prior diplomatic correspondence between the two governments about the boundary issue. Set out the background, identify your national interests, and explain your general approach to the boundary question. Listen to the other side's explanations carefully.
- Discuss the timing of the talks, any agreed guidelines for the conduct of the negotiations, and what if anything to say to the press and media.
- Unless there is time pressure (best avoided), there is no need to make a proposal at the first meeting. Best to take a break and discuss what you've heard with your team.

Opening positions

- An opening position should be carefully worked out. A proposal should be formulated precisely. Good practice to prepare a chart or map showing the proposed line. The justification should be prepared. This should explain how the proposal was arrived at. Mention any treaty provisions which are applicable (e.g. Geneva Conventions or the UN Convention on the Law of the Sea), and precedents (e.g. decisions by international courts and tribunals). Mention any existing boundary agreements in the immediate vicinity, especially any which create a framework for the future boundary (e.g. Belgium-UK). Mention any analogous boundary agreements which adopted the approach being proposed.
- Initial proposal should be based on a sound legal basis. Avoid purely arbitrary lines or ones based on unlawful basepoints, etc. All basepoints and baselines relied upon for drawing a line should be justifiable under the law of the sea. If any potential basepoints on either side are not used, there should be a reason.
- Low-tide elevations should be shown on charts produced by major charting countries to qualify. Checks at sea should be made in cases of doubt. LTEs or isolated islets which are rocks may be justifiable basepoints in delimiting the territorial sea, but isolated rocks are not valid basepoints for delimiting the EEZ or continental shelf (CLOS article 121(3)).
- The method used to construct the boundary should be one of the acceptable methods used in state practice, e.g. an exact, a straightened or an adjusted equidistance line, the perpendicular to the general direction of the coast, the extension of the land boundary out to sea in a straight line, or use of a parallel of latitude or a meridian of longitude.
- Initial proposal should leave some room for manoeuvre. There should be scope for concessions. The proposal should not be your final position as well as your opening position. Care needed if you consider that exact equidistance would be the equitable result, lest other side asks for more. The negotiation could then turn to 'splitting the difference' between the two opening proposals. Proposed lines can easily be made to take on a special status in the talks, even if they have little objective merit.

Available tactics

- Negotiate in good faith. Avoid obvious gambits and ploys which are not sincere. Try to gain and keep the confidence of other side. Exaggerated or over-stated arguments or positions may undermine confidence. At the same time, you are trying to persuade the other side to accept part at least of your argument. You are acting as an advocate for a point of view. There is often no point in concealing positions on your side which are strongly held and legally sound. Face the other side up to them.

- Questions of sovereignty and jurisdiction, involving title to resources such as oil and gas, have a volatile element and if care is not taken to keep the temperature low, passions may rise and there can even be explosions. Whilst in some instances a carefully detonated explosion can clear the air, it is best to avoid accidental pyrotechnics. Better to build up trust than to end up shouting across the table.
- Be prepared to move from opening position. Choose time for moving carefully. Best when other side has already moved or given impression will reciprocate move.
- If one section is agreed in principle, may help the atmosphere to 'bank' that section as being 'agreed in principle, but always subject to the satisfactory resolution of the remaining issues' or some similar formula, and to put it aside for the time being.
- If severe problems are encountered, discussion of the possibility of litigation or conciliation/mediation may be useful. Possible to continue substantive negotiations even when parties have agreed to litigate or to go to conciliation, and even when litigation has begun (e.g. Great Belt Case).

Making concessions

- If differences between the two sides are relatively small, a small concession may be enough to move the negotiations to an agreed solution. If differences are great, a small concession may be discounted as derisory. In that situation, a concession which makes a noticeable difference to the course of the line may be needed to keep talks moving forward.
- Remember that once a concession is made, it will prove to be nigh impossible to recover it. This is true even if a concession is hinted at on a 'personal' level. If you do have to withdraw a personal offer, this is rarely cost-free- both across the table and also within your own government.
- Always try to exchange your concession for one from the other side. Otherwise, the concession may be digested and then, after a little time, a further morsel may be requested. The timing and size of concessions important. Keep in mind the 'bottom line' beyond which you are not prepared to go. Don't move too quickly to your bottom line or you may be forced to go below it in order to reach agreement.

Good luck!

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