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2018

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Towards Ocean Peace: Resolving Disputes Cooperatively and Empathetically through Negotiation

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Introduction

Oceans have immeasurable value. They are replete with natural resources and food sources; they enable transportation and recreation; they regulate earth's climate. In sum, they make invaluable contributions to our physical, economic, and political well-being. And wherever there is something valuable, there are disputes over how that value should be maintained, grown, owned, and distributed. Internationally, disputes over maritime boundaries, access routes, drilling rights, and resource exploration are prolific. A sizeable bulk of international litigation is generated by ocean disputes. In the domestic context, disagreement among stakeholders as to environmental quality and pollution, natural resource management and conservation, geo-engineering, and ocean-based research and technology, are just some arenas of ocean-related disputes. Given the inevitability of such conflicts, it is prudent to consider how we ought to resolve our disputes when they arise. In this essay, I offer some reflections on the utility of informal dispute resolution through cooperative negotiation as a means of resolving ocean-based disputes responsibly and peacefully.

I note at the outset, though, that formal processes of dispute resolution, that is adjudication through a court or tribunal, are necessary for effective governance.¹ Formal processes produce binding outcomes and set legal precedents, their outcomes are public, and the procedural safeguards that characterize formal dispute resolution can help prevent abuses of natural justice and ensure the rule of law. Without formal dispute resolution mechanisms in place if needed, negotiated outcomes are less likely to be fair and equitable—absent any formal oversight, a more powerful party can easily force an agreement

1 Part xv of the United Nations Convention on the Law of Sea, Montego Bay, 10 December 1982, 1833 *U.N.T.S.* 397 [UNCLOS], contains complicated dispute resolution stipulations. It includes a formal, mandatory process for dispute resolution, while anticipating that states will pursue consensual, informal methods of disputes resolution, with an emphasis on diplomatic negotiation; see N. Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (Cambridge: Cambridge University Press, 2005).

upon a less powerful party. But the necessity for robust formal processes should not be taken to mean that they are the most preferable means of resolving disputes. Formal processes tend to be expensive, slow, adversarial and antagonistic. Moreover, they are limited in terms of remedies, because decisions tend to be of an 'all or nothing' nature—one side will win and the other will lose. Resolving disputes through negotiations, on the other hand, offers faster decision-making, a more cooperative and empathetic process, and the possibility of jointly crafting creative win-win solutions. As such, the relationships between parties to the dispute, be they international or domestic, have a better chance of remaining amicable, mutually beneficial, and peaceful for the long term.

Theoretical Approaches to Negotiation

Negotiation strategies and their underlying theories can be divided into two categories: distributive models and cooperative models. Distributive models are sometimes referred to as competitive, positional, or adversarial. They are characterized by the idea that negotiation involves a fixed amount or benefit, so the more one side loses, the more the other gains. Given this basic assumption, negotiators focus on getting the biggest piece of the pie. Negotiators may employ tactics and strategies including opening with a strong position that is likely higher than their estimate of what they can realistically achieve; they may give very small concessions to the other side; they may withhold certain key information. Such a negotiator may come across as tough, demanding, adversarial, and perhaps unempathetic to the other party. That negotiator may seem ideal to her own constituents because of her commitment to maximizing her gains. But there are risks associated with this negotiation style: it may cause an early impasse and prevent a settlement, it may result in exploitive behaviour, or it may damage important relationships.

Cooperative negotiation, sometimes called integrative negotiation or problem-solving negotiation,² is foundationally different. This model has become widely popular through Fisher and Ury's classic best-seller *Getting to Yes*.³ In this model, negotiation involves parties seeking to cooperatively maximize joint gains. It encourages participants to move away from seeing negotiation as positional and competitive, and seeing it instead as interest-based and

2 C. Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem Solving," *UCLA Law Review* 32, no. 4 (1984): 754–832.

3 R. Fisher, W. Ury and B. Patton, *Getting to Yes: Negotiating Agreement without Giving In* (New York: Penguin Books, 1991).

cooperative. That is, parties should try to understand one another's interests and brainstorm mutually beneficial solutions that are objectively advantageous for everyone. That underlying approach to negotiation sets the stage for negotiators aiming to achieve principled outcomes rather than seeking to 'win' a negotiation.

One of the central features of integrative negotiation is that participants focus on the interests at stake rather than the positions of the parties. Fisher and Ury provide a classic example to illustrate the difference between positions and interests: two sisters are fighting over a single orange. Ultimately, they decide that the best solution is to cut the orange in two with each receiving half. One sister then squeezes the orange for a juice and discards the peel. The other sister grates the peel for her baking and discards the pulp. Both sisters took the position that they wanted, and were entitled to, the entire orange. But if they had discussed their interests in the orange, i.e., why they wanted the orange, both could have benefitted more—one sister could have had all the pulp, and the other could have had the entire peel. This simple example illustrates one of the central messages of cooperative negotiation: when we focus on interests instead of positions, we have a better chance at maximize the value of the resource being sought. This is sometimes referred to as 'expanding the pie'. It is not difficult to imagine a similar, albeit very simplified, example in the ocean's context: one state may be interested in sovereignty over waterways for political advantage, while another may prioritize its interest in resources. Understanding differences in the interests that underlie the party's positions paves the way for creative, mutually beneficial solutions.

Uncovering interests is best achieved through an empathic probing into why a party takes a position, and determining what needs are being satisfied through that position. There are a variety of interests and associated needs. Naturally, economic needs are prevalent, but there are others. Some disputes involve process interests, where parties have a stake in ensuring that disagreements are resolved in a manner they consider fair. This was the case during policy negotiations around the type of dispute resolution process that should be stipulated in the United Nations Convention on the Law of Sea (UNCLOS). In some disputes, parties may have a special interest in preserving an ongoing relationship. This may be relevant in ocean-use agreements between neighboring states, or disputes involving the federal government and aboriginal groups in a fishing related dispute, for example. Disputes may even involve personal interests, where a party needs to feel respected, or feels they must preserve their reputation. Some such personal interests may have cultural nuances, which could be especially relevant in international ocean negotiations, so increasing one's cultural intelligence can be a key part of achieving effective

negotiation as well as maintaining positive relationships. Ultimately, cooperative bargaining demands an astute awareness of the interests and needs of all parties, and views negotiation as an opportunity to create value through uncovering interests that may be complementary to each other. The bottom line: the more effort we make to understand each other, the more likely we are to get to effective settlements.

To some, this may seem idealistic. The theory of cooperative negotiation has been criticized as being descriptively inaccurate because it downplays the prevalence and even the benefits of distributive bargaining.⁴ Critics suggest that no matter how much one 'expands the pie', eventually the pie must be divided up. Sometimes, negotiations simply come down to a zero-sum game in the sense that the more one party loses, the other party gains. For instance, in an ocean boundary dispute, one mile gained is one mile lost for the other side. In that context, critics ask, what is the place of cooperative bargaining? Would it not be beneficial to take a competitive stance and maximize one's own gains?

It is undoubtable that settlement of disputes will involve some distributive elements.⁵ But proponents of cooperative negotiation would suggest that even in situations that are purely distributive in substance, parties do have at least one significant joint interest—an interest in resolving the difference quickly and amicably to settle the dispute and preserve the relationship between parties, if possible. As such, the parties must cooperatively engage in a process that will enable a quick and fair solution. And although the substantive issue may be distributive in nature, competitive, hard bargaining is not the only possible process for resolving the dispute. Perhaps parties appoint a facilitator or mediator to assist in their negotiation. Or perhaps they appoint a jointly acceptable arbitrator and agree to be bound by the decision. Such processes may satisfy both parties' procedural and relational interests and can ensure that the ultimate distribution of value will be fair. So, even in distributive situations, parties can still benefit from committing to a cooperative relationship.

Moreover, cooperative negotiating does not imply over-accommodation, nor does it advocate for prioritizing opposing interests over one's own. Part of the cooperative negotiator's tool kit is to rely, and insist, on objective criteria to justify the positions and interests they have, and to assess the legitimacy of

4 For a well-known debate, see J. White, "Pros and Cons of 'Getting to Yes'" and R. Fisher, "Comment on White's Review," *Journal of Legal Education* 34 (1984): 115.

5 See D. Lax and J. Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain* (New York: The Free Press, 1986) for an early integration of cooperative and distributive negotiation models.

the position and interests that other parties have. Such objective criteria may include opinions of scientific experts, jointly or independently obtained data, or the likely outcome of a formal dispute resolution process. Adopting such objective criteria to explain and evaluate positions taken can help to maintain legitimate outcomes, which may even include walking away from a negotiation.

The fundamental point is that when parties adopt a cooperative approach to negotiation, they commit to the values and ideals that inhere in that model—like empathic listening, mutual problem-solving, avoiding exploitation of parties or resources, and obtaining objectively legitimate outcomes. Adopting those principles makes for strong and responsible settlement of conflicts. It would also be in line with the spirit of the UNCLOS, which was “promoted by the desire to settle, in a spirit of mutual understanding and cooperation, all issues relating to the law of the sea...”⁶

Final Comment

Humanity owes its existence to the oceans. In grateful recognition of that, we should strive to ensure that when we quarrel over the ocean, we do so gracefully and peacefully. This requires solid formal procedures in place for when disputes break out, but it equally requires that we learn to manage our conflicts cooperatively. The theory of principled, cooperative negotiation offers useful guidance. It highlights the need for a clear awareness of the shared interests we have in our oceans. It demands that we are empathetic to those whose interests may compete with our own. It calls on us to be imaginative and creative to maximize the oceans' value for all of us without abusing it. Embracing these demands as we work to resolve conflicts would best enable us to make a necessary promise to preserve our oceans and maintain *pacem in maribus*, peace in the oceans.⁷

⁶ UNCLOS, *supra* note 1, preamble.

⁷ *Pacem in Maribus* is the title of the series of 34 conferences focused on peaceful use of the sea, initiated by Elisabeth Mann Borgese under the auspices of the International Ocean Institute in 1970.