Negotiating the Law of the Sea

James K. Sebenius

Lessons in the art and science of reaching agreement

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Negotiating the Law of the Sea

Where order in variety we see
And where, though things differ, all agree.

—Alexander Pope
"Windsor Forest"

An ancient philosopher once said that friendship between men is nothing but a commerce in which each seeks his own interest. The same is even truer of the liaisons and treaties which bind one sovereign to another, for there is no durable treaty which is not founded on reciprocal advantage, and indeed a treaty which does not satisfy this condition is no treaty at all, and is apt to contain the seeds of its own dissolution. Thus, the great secret of negotiation is to bring out prominently the common advantage to both sides and to link these advantages that they may appear equally balanced to both parties. For this purpose when negotiations are on foot between two sovereigns, one the greater and the other the less, the more powerful of those two should make the first advance, and even undertake a large outlay of money to bring about the union of interests with his lesser neighbor . . . The secret of negotiations is to harmonize the interests of the parties concerned.

—François de Callières
On the Manner of Negotiating with Princes

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Introduction

This book is built around an interpretive account of a negotiation in which I took an active part. Drawing on my experience with the Law of the Sea (LOS) conference, I first offer the financial aspects of these deliberations as a case that suggests some propositions about crafting agreement in complex bargaining. Then, through a negotiation-analytic lens, I probe the larger U.S. strategy from its early steps to the 1982 rejection of the treaty. Finally, in a more formal style, I try to generalize some of these ideas. Beyond LOS chronicle and analysis, however, my real quest is for systematic insights into the means for shaping good negotiated agreements.

The extended LOS example is not written from the standpoint of a neutral observer; at the outset I should declare my involvement. My association with the LOS conference began in the summer of 1977, after a year as a Stanford Fellow, assigned to the administrator of the National Oceanic and Atmospheric Administration. I then joined the U.S. Law of the Sea delegation, led by Ambassador Elliot L. Richardson. Shortly after entering the Business Economics program at Harvard the next fall, I began to work with a project at the Massachusetts Institute of Technology that sought to model a deep ocean mining system. Over the next three years, I continued with the U.S. delegation and attended most of the negotiating sessions. I soon started to serve in an informal staff capacity to Ambassador T. T. B. Koh of Singapore, who chaired the LOS Negotiating Group on Financial Arrangements. The group's deliberations constitute a particular focus of this book. From this triple vantage point — that of U.S. delegation member, that of Negotiating Group staff, and that of liaison between the MIT modeling effort and these other two bodies — I had the opportunity to

participate in the negotiation and to relate it to the more theoretical approach I was absorbing in Cambridge. The result was my doctoral dissertation, woven from the twin strands of academic reflection and LOS experience. Although analytic and editorial generations separate this study from its ancestor, I have tried to transmit these same strands.

The task confronting the Third United Nations Conference on the Law of the Sea in 1974 was no less than the design of the legal regime to govern more than 70 percent of the earth's surface. The negotiators had to hammer out rules on subjects as contentious as navigational freedoms, territorial bounds, fishing rights, offshore hydrocarbons, marine pollution, and a potentially vast mineral resource in the deep ocean, so-called manganese nodules, unanimously declared to be the "common heritage of mankind." By 1978 the negotiators had reached agreement on more than 90 percent of the draft treaty articles. Seven critical sets of issues became the negotiating focus of the conference. Among these hard-core questions, upon whose resolution the fate of the treaty was expected to turn, were the financial aspects of a sort of mega-mineral contract between "mankind" and future seabed miners. A linked issue concerned the funding of a new international entity that would mine directly on behalf of the international community.

Two years of complex bargaining finally overcame the impasse on these "financial arrangements." Not only was an agreement worked out, but, remarkably, the delegates from more than 150 countries produced a text on the financial terms of contracts that in many ways is more sophisticated than most existing bilaterally negotiated mineral contracts on land. I was intrigued by the substance of this innovative outcome, by the novel procedure for reaching it, by the personalities involved, by the puzzle of how a U.S.-built analytic model could play a prominent role in these politicized deliberations, and by myriad other aspects of the agreement. The controversial U.S. decision not to sign the treaty two years later prompted me to review the origins of the conference and to evaluate the overall U.S. negotiating strategy.

It would be an understatement to say that my participation in this intense process suggested promising directions for the formal analysis of complex bargaining situations. At the same time, an emerging cluster of ideas, informally referred to as "negotiation analysis," with its origins in decision analysis, game theory, and the economics of industrial organization, proved useful to my day-to-day work in the negotiations. The mutual conditioning of academic analysis and conference participation should be evident in the emphases I have chosen.

Part I contains my interpretation of the financial portion of the LOS negotiations. Its background, parties, and issues constitute Chapter 1.

Chapter 2 is a chronology of the financial negotiations from their emergence as a central issue through their resolution. Chapter 3 draws together some of the major factors behind the negotiated agreement. These ideas, although then in much rougher form, were among those that helped to guide my actions at the conference. From agreement "in the small" on financial questions, Chapter 4 seeks to explain and evaluate the U.S. disagreement "in the large" with the entire treaty.

Part II extends and generalizes some of these factors beyond their initial LOS setting. Chapter 5 examines the proposition that negotiated agreements often consist of dovetailed differences among the participants. It investigates potentially useful differences in such areas as values and probabilistic beliefs, as well as attitudes toward risk and time. Emphasis is on the identification of what might be called structural aspects of potential agreements. The analysis deals very little with the means, either procedural or interpersonal, of realizing these potential bargains. The discussion commences with a nontechnical introduction to the main ideas of a "differences" orientation; it concludes by developing the theoretical underpinnings of much of the previous analysis. Mathematically framed results are presented on randomization and betting on the basis of different probabilities, competitive revelation of probabilities, risk sharing, indirect transfer of asymmetrically held information, risk properties of taxation instruments, and methods of blending differences in time preference. These ideas may have broader economic application than just to the study of negotiations. All the discussions requiring more than elementary algebraic or graphic reasoning are segregated in Section 5.2.

Chapter 6 is an investigation of the proposition that the parties and issues themselves, rather than being "givens," are often important choice variables in negotiation. This chapter argues that moves to manipulate issues or parties can be considered useful classes of tactics for negotiation analysis. Simple techniques can relate some of their means, ends, and outcomes to one another. I examine numerous effects of such moves on the zone of possible agreement and the process of reaching it.

I intend Parts I and II to be strongly complementary, but they may be read independently. Within Part I those readers interested in the particulars of the financial negotiations may wish to concentrate on Chapters 1 and 2 and to pass quickly over Chapter 3. Those more interested in general aspects of reaching agreement in multilateral negotiations might skim Chapters 1 and 2, which are largely narrative, and most profitably focus their attention on the propositions of Chapter 3. Chapter 4 deals much more with the broad *substance* of U.S.

Law of the Sea policy, explained and evaluated, however, in simple terms congenial to analysts of negotiation. The two chapters (5 and 6) of Part II are concerned with general aspects of negotiation. They may be read independently of each other, and, for those less interested in LOS matters, Part II may be read without reference to Part I.

The chapters of this study are implicitly connected by their focus on negotiation and by the examples from the LOS conference that are scattered throughout. In order to make each major section self-contained, however, I have not hesitated to repeat explanations or examples if they seemed relevant in more than one place.

PART ONE

Agreement in the Small, Disagreement in the Large: Financial Arrangements and the Law of the Sea Conference