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Transboundary Bargaining: A Multidimensional Approach

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PAUL MEERTS, AUG 7 2008

Boundaries are both an obstacle to – and an opportunity for – effective negotiation, and thereby to its give-and-take component: bargaining. Negotiation is the broad concept of the process of planning, exploring, parking, trading, deciding and implementing in situations of opposing and converging interests. While negotiation is the broad process of giving something in order to get something, bargaining can be defined as the nucleus of this interaction. It is thus the heart of the negotiation process: the phase of compromising and compensating, trading concessions and emotions. These processes of conflict management and resolution are not unlimited. They proceed in a distinct setting, a recognizable format. This article is about the interconnectedness between process and structure, flow and bedding, river and shore. It focuses on the importance of the context for the process and its positive and negative impact.[1]

The author would like to introduce the 'Water Metaphor' in order to clarify the connection between processes and their boundaries. Let us regard the bargaining process as the water and the glass as its delimitation. Without the glass the water cannot be drunk effectively. We might try to swallow the liquid by gushing it over our hand, but a substantial part will spill over and be lost. Without the glass, our consumption will be ineffective, without the boundary the bargaining process will lose a substantial part of its effectiveness. The effect of this loss of value will probably be an enhanced use of alternative means of conflict resolution, like warfare. However, the glass can also be a restraint. Maybe the process should be broad and inclusive or small and inclusive. In that case the boundaries pose problems. The glass may be too small in the first case and too big in the second.

A boundary is an obstacle and an opportunity in the process. Delimitations in negotiation restrict the freedom and flexibility of negotiators, but it can also be a tool to push things forward. In this article the focus will be on six boundaries:

1. geographic: borders between states and state entities, the issue of sovereignty;
2. systemic: the strength of states and international organisations;
3. needs: the role of interests and positions;
4. resources: the capacity of people and their tools;
5. regulators: the significance of rules and regulations, norms and values;
6. time: short term versus long term perspectives and projections.

Question: what are the positive and negative consequences of these limitations?

Hypothesis: without limits negotiation cannot be a viable tool in international relations, the positive aspects of boundaries outweigh the negative, with some notable exceptions.

1. Geography: Bargaining Borders

Geographical borders were negotiated on in the two classical ways to solve a bargaining problem: compromise or compensation. Compromise in the sense of a negotiation focussing on the border and trying to change its course will

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be called micro-border-bargaining here (in the sense that diplomats focussed on the border and bargained its change). Macro-border-bargaining would be the swapping of whole territories and people from one ruler to another, compensating the loss of one territory by gaining another one. An example of this is the loss of Swedish Finland to Russia in 1815, the Swedes being compensated by Norway which had been ripped off Napoleon's ally Denmark. Another example might be the King of the Netherlands gaining Belgium and Luxemburg in exchange for losing the lands of his ancestors in Germany. The Second World War put an end to second mode of border bargaining, though Yalta can be seen as the last negotiations where country-swapping has been practiced. From a negotiation point of view this limited the range of options available to diplomats and those who instructed them. It took away opportunities for integrative win/win bargaining and strengthened the tendency to see border negotiations as distributive, win/lose processes, or even lose/lose as in the former Yugoslavia. Perhaps it is not a coincidence that at the turn of the century The Hague Peace Conference took place, creating the international Court of Arbitration and paving the way for present-day International Court of Justice. Diminishing negotiation options had to be compensated by tools for adjudication.

The border question implicates sovereignty and suzerainty, the autonomy of the people within the delimitations of their territory implies sedentary units: states. The transition of societies of hunters to cattle herding, to agriculture and craft and trade in and between enlarged settlements like cities, created the prerequisites for states. In the process, emerged more or less fixed borders demarcating the more or less absolute power of the rulers over people and palatinates. Within those borders to be bargained, (semi-)sovereign blocs came to flourish. Negotiations between these boxes became extremely tough. Unlike negotiations on internal matters, where the ruler or one of his grand-vizirs could always force an outcome if internal haggling came to an grinding halt, negotiators were much less in control of external affairs. If anything distinguishes national and international negotiation, then it is the measure of control over the process. While internal bargaining has more assured-outcomes, bargaining across-borders is characterized by less-assured agreements. Both in creating an effective process and in securing implementation of the promises made to the other party.

Regime-building as an alternative to trust-building is to a large extent the answer to enhanced control in cross-boundary bargaining[2]. Perhaps it is not a coincidence that the growth of multilateral international organisations in the twentieth century is in pair with the loss of opportunities for boundary swapping and the growth of packaging. Package dealing is a hallmark of multilateralism. To dispense with the tool of country-swapping, compensating territorial losses, narrows possibilities for negotiated solutions. Package dealing in a multilateral setting might be a way out. Countries can now swap issues instead of land. Rising interdependency implies a loss of sovereignty, both inside and outside international regimes. Geographic, and thereby political, boundaries are losing their significance in global governance. In the very long run the border problem in bargaining might thereby wither away.

However, geographic and sovereignty borders also had a positive impact on the negotiation process. Mandating diplomats has been a more or less transparent process. Ambassadors were instructed by the prince to negotiate on the external dimension. This is becoming less clear as a horde of ministries, parliaments, companies, trade unions and other pressure groups are mingling in the process of mandating as national and international spheres are merging. It is particularly true in countries like Denmark and The Netherlands where the distinction between executive and law-makers has been waning. Dutch negotiators have the additional problem of difficult internal coordination in preparing EU bargaining. Mandates are often unclear as they are a compromise by themselves. Add to that the progress in means of communication, as well as the impact of specialized ministries entering the external bargaining platforms, and a loss of autonomy of the diplomatic negotiator is coming to the fore. This in turn might have a negative impact on her or his ability to be creative in the process and to act in a situational manner. As negotiation is context driven, and thereby per definition situational, the fading out of geographic and political borders could have a stiffening effect on negotiation navigation.

That in turn can diminish the effectiveness of negotiators and thereby of bargaining as a tool in conflict resolution in global governance. Geographic borders are, however, not the only borders in international negotiation processes and the evolvement of other delimitations will have consequences on the bargaining as well. Though there are many limitations of a non-geographic nature, in this article we select only a handful of them. Namely: systems – interests – resources – regulators – time.

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2. Systems as Limits in Bargaining Processes

The construction of the international system creates obstacles and opportunities in transboundary bargaining. Intergovernmental and non-governmental organisations, states as well as regions, political parties and private sector companies, will limit and enhance the opportunity for successful negotiation processes.

An important function of international and supranational organisations is to compensate for a lack of trust. As has been said, trust is essential but not often assured. Exchanging family members does not work anymore as royal courts are no longer the focal point of modern power structures. Leaving garrisons behind as a guarantee for implementation is also not done anymore. Military basis nowadays have a more external function. The days of the Tatar or Polish garrisons in Moscow, is long gone. As is the Dutch barrier of fortresses in Belgium against a possible French surprise attack, also acting as a control mechanism over the policies of the Spanish and Austrian rulers of Southern Netherlands. International regimes will have to do the job. They create a more or less tightly-knit constellation of states who, if they do not want to live-up to their international promises, will be forced to keep them. Of course, if the international organisation is weak, it will be less successful than if it carries supranational authority. In other words: the more interdependency between states, the more an effective negotiation process is needed, the stronger the international fabric has to be.

Political reality cannot be overlooked, however. Powerful countries cannot easily be contained within the limits of international regimes. It could not be done when the French and Germans acceded the three percent budget limit prescribed by the European Monetary Union. Neither did it work when the United Nations Security Council did not agree with the commencement of the Third Gulf War. But international regimes do have an important function in channelling bargaining processes in such a way that their efficiency and effectiveness will be optimized. Without these organisational boundaries there can be no effective processes. But of course, these limitations have negative effects as well, like inflexibility through over-bureaucracy.

To take the argument one step further, mankind has tried to overcome the trust, and partially also the power, imbalances by creating ever-closer cooperation. Attempts were made through regular diplomatic bilateral meetings, the first diplomatic conferences with more than two parties involved, the foundation of long-lasting conference frameworks, bringing the dimension of time into the picture. Long-time stability created opportunities for concession making on, not only a short-term, but also a long-term basis, thereby diminishing the prisoners-dilemma factor in finding common ground between opposing short-term interests.

3. The Role of Positions and Interests

Parties take positions connected to their needs. These positions will normally be more extremist than the interests they have to defend. Depending on the situation these positions will be more or less exaggerated. In ad-hoc bargaining, like in the bazaar, more polarised behaviour can be expected. This will often be a one-time deal with a serious shortage of trust and information on both sides. There is also power asymmetry that will have to be dealt with as a boundary to effective negotiation.

The customer, being outside twelve carpet-shops, has a better Best Alternative to a Negotiated Agreement than the merchant: she or he can choose and therefore has alternatives strengthening his power position. Clearly one of the carpet merchants will try to change this imbalance by luring the customer into his shop, thereby changing the situation in his favour. And as Sun Tzu[3] has said: strategy is to change a situation in such a way that it will be ripe for your victory. The negotiation problem is the fruit of the situation it has been born into. Without changing that context, the problem cannot be solved through bargaining as it will always pop-up again, until external incentives change its environment. By getting the buyer into the seller's shop, the context will change in favour of the carpet expert who can now use his Best Alternative to a Negotiated Agreement, being other more beautiful and therefore expensive rugs. The seller can now deploy his strength, composed of alternatives, plus more expertise about quality and price, and more effective bargaining skills.

There is a cultural element as well. In some cultures excessive first bids will not prevent buyers and sellers

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concluding a successful agreement, in others it will. The experience of the author of this chapter, in training diplomats and civil servants, is indeed the importance of the perception of negotiating parties on process, procedures, positions, power and products (in the sense of agreements). Perception determines reality. In some cultures perceptions are checked and can be changed. In others they are inflexible and static. People might be used to haggling and therefore would not hesitate to use distributive bargaining (and may actually enjoy it), others are accustomed to fixed prices and don't like the risk of the give and take. It should be noted here, however, that flexibility in market haggling does not necessarily mean having an open mindset on negotiation processes between states. To the contrary, the author observed the reverse: the majority young diplomats from 'haggling cultures' have a tendency to be very positional / inflexible in interstate bargaining. Those from cultures where horse trading is not a part of day-to-day life, and where the approaches to negotiation are more rational and less emotional, will be inclined to be more relaxed in interstate processes. This is a general statement of course; there are many exceptions to the rule.

In some cultures a concession will be seen as a tool that can be used to bridge the gap between positions and to move in the direction of uncovering the real needs and thereby find synergy between the parties – and if needs be to create synergy and Zones of Possible Agreements[4] between the actors through trade-offs. In other cultures a concession might be seen as a pure loss, even if this could be more than compensated by certain gains. To offer something will be seen as a loss of face, not in the market-place, but in a negotiation between states, sovereign units. Especially if negative emotions rule the game, trauma's from the past and hatred bedevil the process. Even if a profit can be made, the parties will renounce it, as the gambit is emotionally unacceptable, especially to the people in the streets. Culture and character can both limit and remove obstacles in transboundary bargaining.

Then there is the impact of the gap between the interests and the question how to bridge it. A wide gap will obviously be a barrier to win/win bargaining, a wide zone of overlap between minimum and maximum positions will ease the negotiation process. Sometimes overlaps are absent and negotiators will have to remove this boundary through trade-offs. A multi issue process might be needed, maybe a multi-party interaction as well. Both complexity and opportunities will be created on purpose, throwing-in new obstacles and new solutions. If bargaining is anything, then it is a paradox. Solutions create problems and problems open windows for outcomes, depending on the linkages between those problems and the relationships between the parties struggling with their common and opposing interests. In general longer processes will be needed to overcome complex situations. Interests will have to be reframed, negotiators mindsets will have to be turned-over. This takes energy and time, and also resources to deal with the bargaining barriers in an effective way.

4. Resources: Human, Immaterial and Material

Power and influence are based on available resources, Power and influence create boundaries for the weak and remove them for the strong. But power and influence are not only structural, but also situational. The question is not only what the resources are, where they are and who is controlling them, but as much: how they are dealt with in the process we need to go from A to B, and how they are influenced by that process.

Humans then, pose boundaries and create opportunities.[5] Character, culture, expertise, profession, skill, style, non-verbal leaks. It all contributes to a positive or negative flow of the process. The question of the effective negotiator is an old problem, some authors found some reasonable answers. For example: somebody who is tough in defending his or her interests, while being flexible in the process. They use power without overdoing it, working on the relationship with the other side without coming to close, as emotional blackmail will have to be avoided. For example, parents have all the material resources children lack, but the children are often the more successful negotiators, using the emotional means at their disposal. In relationship dominated bargaining this will indeed give the emotionally skilled negotiator power. In a business-like, more rationalistic process, the relationship will be of less importance. Ratio and emotions will either create boundaries or remove them, depending on people, context and their interdependencies.

Immaterial resources have been partly dealt with in the paragraph before. But these resources are not always tied to individuals. They can also be an integral part of history or culture. Moral obligations, suffering in the past, cultures of

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blaming and of shaming. They all bring emotional boundaries into play. If the Germans had not accepted their wrongdoings in the crisis we call the Second World War, then the European Union could not have been so successful. In other words, the boundaries to the convergence of material resources could only be removed by conceding on the emotional dimension. Without the expression of guilt, no business could be done. We see this problem in cases like the rape of Nanjing, being a tool in the hands of the government of the Peoples Republic against Japan, whenever the political situation demands pushing the other side into a corner in order to strengthen the Chinese bargaining position. This event from the past is then a boundary to effective negotiation behaviour for Japan and an opportunity for Mainland China. The same is true for the atrocities against the Armenians in the Ottoman Empire nearly a hundred years ago in 1915. Non-acceptance of responsibility will be a barrier to Turkish EU accession and can be used to keep the Turks out without naming other – more painful and important – obstacles like the Muslim – Christian divide. These questions also play a role in the relationship between Serbia and the European Union and will have an effect on Balkan stability.

Material resources will, in general, be a more decisive boundary for the less-powerful than immaterial. But again the question is to what extent the relationship between the bargainers might reverse the power-balance between them. And of course the question should be answered: what are the boundaries to employing structural resources on unsuitable terrain? By winning the conventional war in Iraq the Americans changed the situation in favour of those who can swim as a fish in the water of guerrilla warfare. 'Salami tactics' will slice down the potential of the other side. Entrapment will undo the effectiveness of many of the structural material resources available. This step-by-step process can, according to prospect theory, only be undone by a government that did not carry the responsibility for it. De Gaulle, not being responsible for the French entrapment in Algeria, could start the bargaining process solving the problem. As the Republicans could take away the barriers against withdrawal from the swamps of Vietnam, it will be the Democrats who can take the USA out of their entrapment in Mesopotamia.

A special kind of material resources are natural resources like gas, oil, iron, gold, and to a certain extent food and wood. Their ever growing scarcity will give rise to a multitude of bilateral and multilateral negotiation processes of a predominantly distributive nature. As availability of these commodities will diminish, the bargaining processes will multiply and polarize. The transboundary nature of these processes will not be limited to cross-boundary international bargaining. It will be characterized as much by trade-offs and compromises between regions within countries. This in turn can set internal strife into motion, enhancing the two-level dimension of transboundary bargaining, adding to its complexity. This will put a serious strain on regional and global negotiation systems, to the extent that new, innovative, forms of transboundary bargaining will have to be developed.

5. Regulators: Law, Procedures and Diplomatic Norms and Values

Rules and regulations can be both obstacles and facilitators of effective bargaining. The dictum of the *mare liberum* is not by accident a Dutch 'invention'. The Republic of the Seven United Netherlands needed unrestricted usage of the seas in order to dominate them, thereby making as much money – through trade and piracy – as possible. Those who are weak will need protection through international law. To the strong, the law might be an obstacle. It is interesting to see the change in the policy of the United States towards the multilateral systems. During the cold war multilateralism helped the US to keep the USSR at bay. After the dissolution of the Soviet Union the multilateral fabric created a boundary to the optimal employment of force against opponents. Therefore an anti-multilateralist attitude prevailed during the Bush administration, providing new opportunities in the short run and creating serious long-term problems.

Procedures are important delimitations in transboundary bargaining, regulating the behaviour of the parties in such a way that the processes might be successful. In that sense procedures are boundaries creating channels for effective processes, though they will also hamper those parties who want to exceed these delimitations for situational purposes. It is very much up to chairpersons, secretariats, facilitators, mediators and negotiators to deal with procedures in such a way that they will not be a negative bureaucratic obstacle while they will have to manipulate them in favour of a successful outcome. Stop-the-clock tactics used by negotiators in the framework of the Conference – later Organisation – on Security and Cooperation in Europe (CSCE/OSCE) are an example of mollifying the procedures in order to temper the negative effects of their inflexibility. Another example is the incorrect

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translation of certain wording on the Human Dimension of the Helsinki Final Act in order to produce an outcome acceptable for all parties.

Diplomatic norms and values regulate negotiation behaviour in order to overcome cultural and other differences and to create opportunities for effective flow. But outsiders might see them as barriers to effective participation in the process. Not being acquainted with these prerequisites they could feel excluded and discriminated against. Those who master the diplomatic formula will be more successful than those who don't, with Talleyrand as a shining and at the same time monstrous example. Etiquette made diplomatic bargaining fit for those who knew how to observe it and use it, the nobility and the elite of the state.[6] It gave them a monopoly on negotiation, also because of the money they had available at a time where the function of Ambassador Extra-ordinary and Plenipotentiary did not generate any salary.

This is changing of course. New layers of the population entered the diplomatic strata in the nineteenth century. Now, the monopoly of the nobility has withered away, though in some diplomatic niches like protocol departments and court-staffing they hold out. In 1978 the author researched the composition of the Dutch Diplomatic Corps. Not much of the nobility was left (5% of the staff), but a comparison between the civil servants tied to the ministry and those who were rotating between headquarters and embassies, made clear that there was still a relative difference. There were twice as many people of noble offspring in the rotating service as in the non-rotating service.

6. The Time Factor

Time in a macro sense has already been touched upon because of the impact which events of the past have on present and prospective bargaining processes. History mirrors itself into the future, the future mirrors itself into the present. For a member-state of the European Union, upcoming negotiations will throw its positive or negative shadow over negotiations today. On a positive note the expectations of harmonious processes in the future, where counter-concessions are to be expected in order to compensate our gambits of the day, time will help negotiators to be more flexible in give-and-take. Negative expectations however, fed by bad experiences in the past for example, will leave negotiators less open to a fruitful bargaining process. A future threat might force us to cooperate, while short-term losses might create unwillingness to do so. An interesting example over time is the success-story of the Confederatio Helvetica. Switzerland is an impossible country. Costly agriculture and infrastructure, difficult terrain and autarkic people, no abundance of natural resources and the absence of sea-ports, two major religions and four different indigenous languages. Such a country can exist because of the time factor, the prospect of poverty and loss of autonomy if cooperation is successful.

In a micro sense time is an important boundary to bargaining as well. A shortage of it will limit the opportunities for finding integrative solutions. And there is always a restraint as far as time is concerned. Countries will create time pressure in order to come to conclusions, deadlines are needed as otherwise the process will continue endlessly. States will wait with major concessions till time is – nearly – up and this will create a crisis atmosphere. If timing is important, when is the moment ripe for conclusions? Not too early, not too late, but how to be effective in this? We need time for pre-negotiation and for post-agreement bargaining. Some will buy time as they need the situation to change before they can bargain a profitable outcome, others are in a hurry. Upcoming elections might be a boundary to negotiating outcomes now, or they may force opponents to concede hastily as the new government might not be willing to conclude a treaty with them. In some cultures negotiators feel the absolute need to hurry up anyway, while in others there time horizon is so wide that they can wait for another fifty years for Taiwan to fall into the cradle of mainland China. Action now might diminish the chances for a advantageous outcome later. Some bargainers can still follow a negotiation process while seven of them are talking at the same time (poly-chronic), others have a need for bargaining on a one-dimensional time-level (mono-chronic). These different approaches create opportunities as well as obstacles.

Conclusion

Some positive and negative effects of delimitations have been dealt with, but thorough research is needed. In that respect a special issue of the Journal on Group Decision and Negotiation has been foreseen in two years time,

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dealing with the function of boundaries in bargaining processes. This article identified some aspects of process and context connectedness, concluding that bargaining is a viable alternative to warfare and other tools of conflict management, but it can only be effective if it is set in certain limits. Without boundaries, there can be no effective bargaining. These processes can flourish in a world of carved-up in states, structured by systems, squeezed between common and opposing interests, on the basis of human and other resources, regulated by law and mores, operating under variable time constraints. This is the positive side of the coin – without this the process will not work.

However, boundaries also pose problems. Geographic limits can be an obstacle in effective cooperation. This is why we try to let geographic and other boundaries evaporate in the European Union. Systems might exclude potential partners. Radically opposing interests create intractability. Humans are often unwilling to negotiate because of the past, present and their vision of the future. Regulations can strangle creativity. Bargaining takes time; if not enough is allowed for the process then it will falter or at least give sub-optimal outcomes. But these are the negative situational effects of a structural ingredient we defined as a prerequisite for bargaining processes: boundaries. In other words: without delimitations no negotiations, but we have to undo the negative aspects of them. Without nerves no happiness in life, but these same nerves can unleash pain we would like to avoid as much as possible.

Paul Meerts is Professor in International Negotiation Analysis at the College of Europe in Bruges (Belgium) and the Charles University in Prague (Czech Republic). He is a Member of the Steering Committee of the Processes of International Negotiations (PIN) Programme at the International Institute of Applied Systems Analysis (IIASA) in Laxenburg (Austria) and of the Advisory Board of the Journal of International Negotiation (Washington). As co-founder of Clingendael, the Netherlands Institute of International Relations, he has been Director of the Department of Training and Education (1983-1989) and Deputy Director of the Institute (2000-2006).

[1] It should be understood that our approach is – of course – limited in depth and length due to the constraints on this article.

[2] B.I. Spector and I.W. Zartman (eds.) *Getting it Done: Post-Agreement Negotiation and International Regimes*, Institute of Peace Press (Washington), 2003.

[3] Tsai Chih Chung, *Sun Zi, the Art of War*, Asiapac Books & Educational Aids (Singapore), 1991, p. 12.

[4] H. Peyton Young, 'Fair Division', in H. Peyton Young (ed.), *Negotiation Analysis*, The University of Michigan press (Ann Arbor), 1994, pp. 25-45.

[5] I. William Zartman and Maureen R. Berman, *The Practical Negotiator*, Yale University Press (New Haven and London), 1982.

[6] Abraham de Wicquefort, *The Ambassador and his Functions*, Maurice Keens-Soper (ed.), Leicester University (Leicester), 1997.