

Negotiation & ADR: LAW 508

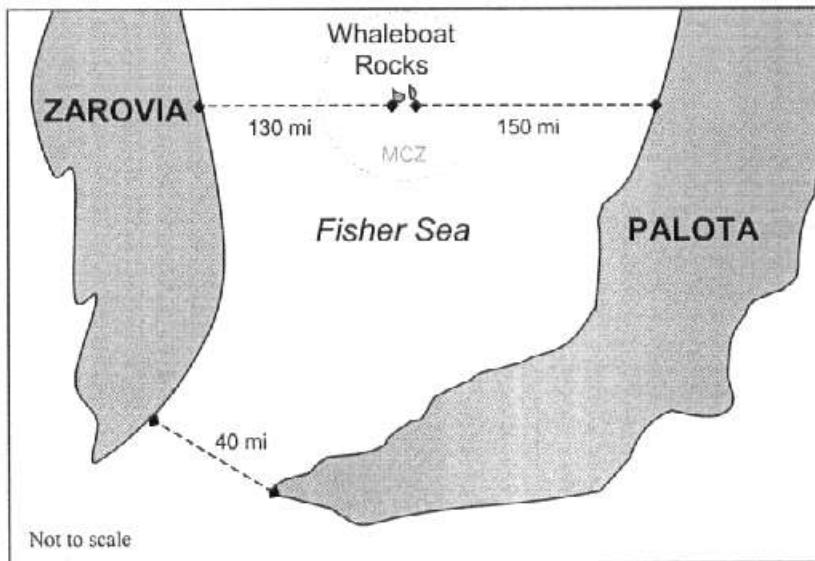
Final: Simulation

Exam #206605

This simulation is loosely based on the dispute between Japan and Korea over the Liancourt Rocks, but diverges significantly from the facts and history of that dispute. Please note that the facts and the economic and legal principles (i.e. the economic growth predictions, the "Maritime Commercial Zone") presented in this simulation may be fictitious.

ZAROVIA: Confidential Fact SheetUndisputed

Zarovia and Palota are neighboring countries separated by the Fisher Sea. At their closest point, Zarovia (a peninsula) and Palota (an island) are separated by a 40 mile strait. The subject of this dispute is the ownership of the Whaleboat Rocks. The Whaleboat Rocks are located in the Fisher Sea, and are located 130 miles from the eastern coast of Zarovia and 150 miles from the western coast of Palota.



The Whaleboat Rocks are two islets that are roughly 500 feet apart. The western rock is slightly larger than the eastern rock; together, they occupy about 45 acres in area. The Rocks are, unsurprisingly, very rocky and almost uninhabitable. Maritime law provides that a country has the right to the resources in its Maritime Commercial Zone (MCZ), which is the seazone that extends 50 miles from its coastline. In the case of this dispute, possession of the Rocks would carry an MCZ of the 8,000 square mile area around the rocks.

The history between Zarovia and Palota is long and contentious, and involves a period of occupation of Zarovia by Palota, now viewed by Palota as a period of legal annexation and by Zarovia as a period of brutal occupation. In recent years, both states have become economic leaders, creating fierce economic competition between Zarovia and Palota, as well as an inevitable awareness of the benefits of economic cooperation in this era of globalization. However, the ownership of the Whaleboat Rocks remains a prominent point of contention between the two states. Throughout history, the Rocks have appeared on both Zarovian and Palotan maps. Currently, a number of Zarovians and Palotans list the Rocks as their residence, although the only full-time residents of the Rocks are five Zarovians. Neither state has exercised MCZ rights around the Rocks or implemented any commercial operations on the Rocks because both states have indicated intentions to interfere should the other state commence such action. The dispute is scheduled for hearing by a binding arbitration panel, the World Marine Resources Council (WMRC), but due to the bureaucratic procedures involved, it likely will not be heard before 2026.

ZAROVIA: Confidential

You represent the country of Zarovia and have requested a meeting with the Palotan representative, to be held on the Whaleboat Rocks, in order to resolve ownership of the Rocks. The Zarovian administration is uncertain how the WMRC will decide, but regardless, economic and political pressures compel an earlier resolution. With the fast-growing Zarovian economy, the demand for energy is skyrocketing and Zarovia's geologists - the five full-time islet residents - have covertly determined there are oil reserves somewhere under the 8,000 square mile seabed in the MCZ surrounding the Rocks. Without the oil, economists estimate that Zarovia's economy will generate only \$2 billion per year for ten years, and then stagnate. With the oil, economists predict that the economy will generate \$20 billion per year, every year it has access to oil, indefinitely. Alternatively, the geologists anticipate there may be coal in the Rocks themselves sufficient to sustain a similar level of economic growth, but they cannot be certain without extensive excavation over the entire area of the Rocks, which will render the islets entirely uninhabitable.

The political pressure is also intense: The public is highly suspicious of Palota's interest in the Rocks, especially in light of the history of occupation, and newspaper editorials have charged Palota with ulterior expansionist motives. The history of occupation has also created some nationalist sentiment, with many Zarovians viewing the Whaleboat Rocks as a symbol of Zarovian strength in spite of an oppressive history.

The current administration has been viewed as weak on foreign relations and the head of state has dispatched you with the directive to resolve this matter aggressively and definitively, with the implication that your job is on the line. The administration has authorized you to offer up to \$20 billion to Palota toward resolving this dispute.

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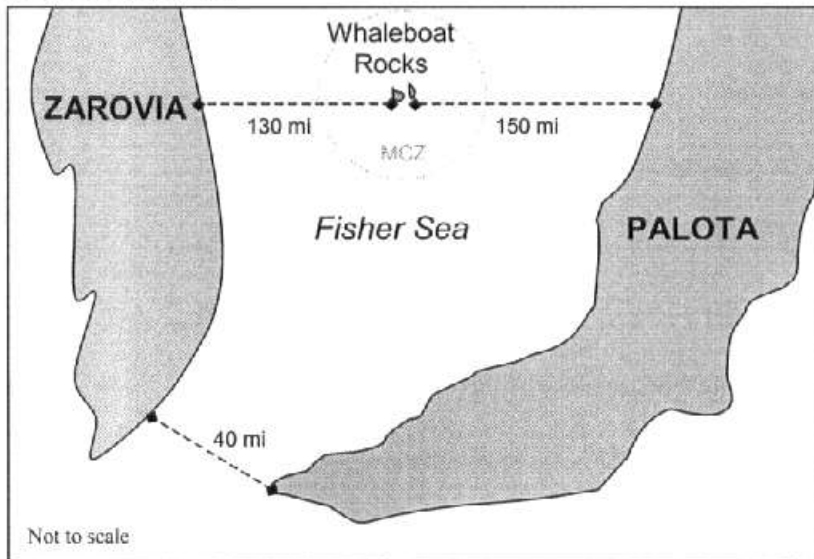
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PALOTA: Confidential Fact SheetUndisputed

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PALOTA: Confidential

You represent the country of Palota and have been summoned to a meeting, to be held on the Whaleboat Rocks, by the Zarovian representative in order to resolve ownership of the Rocks. The Palotan administration was pleased to receive the invitation because recent information indicates that the WMRC will likely award Zarovia ownership of the Rocks should the dispute reach arbitration. Palota generates \$2 billion per year from the fishing of whalefish, a prized delicacy in Palota. Whalefish lay eggs exclusively in the MCZ around the Whaleboat Rocks; the adult whalefish later migrate to the MCZ around Palota, where they are harvested by the long-established Palotan fishing industry. Whalefish eggs are extremely delicate and cannot survive any environment other than the undisrupted seabed around the Rocks. Palotan state bioengineers have been attempting to genetically engineer hardier whalefish eggs capable of surviving the rough waters on Palota's eastern coast, but at the current level of investment, they are unlikely to succeed until 2031, after 25 more years of continuous research. (The bioengineers have suggested that for every additional \$1 billion of funding, they will be able to shave a year off the research time.) In the meantime, they require biological material from freshly harvested whalefish for their research.

In terms of political concerns, the Palotan administration is aware of sustained anti-Palotan sentiment in Zarovia and is concerned about the potential of a military conflict, especially in light of Zarovia's economic strength. In particular, the Palotan Department of Defense is very suspicious of the five full-time Zarovian residents and the Department has conveyed to you that it would like to establish a surveillance station on the Rocks. You have also independently heard rumors of increasing Palotan military activity in the Fisher Sea, but administration has been very tight-lipped and has not substantiated the rumors.

ANALYSIS

Interests

The conflict presented by this simulation is multi-faceted, and incorporates economic and political interests and the intersection of those interests. The primary dispute is over the ownership of the Whaleboat Rocks. Both states have economic and political interests at stake. Zarovia's economic interest is in the oil under the seabed and the potential for coal in the Rocks. Palota's economic interest is in the whalefish that spawn in the Whaleboat Rocks' MCZ, both for the fish themselves as well as for the eggs used for genetic engineering. The economic interests are also influenced by time factors. Zarovia is interested in oil now because of the immediate potential for growth and because it doesn't know how the WMRC will decide. Palota is interested in resolving the conflict now in order to reserve some rights, to ensure the whalefish's survival, or to salvage some monetary remedy while it has the chance, because Palota knows that the WMRC's decision in twenty years' time will divest Palota of any bargaining strength.

The political interests complicate the states' economic objectives. Zarovia's political interest is in demonstrating its political strength against Palota in this dispute by maintaining/obtaining control of the Rocks and the MCZ. The Zarovian administration also has a political interest in demonstrating assertive action to the Zarovian public. Palota's political interest is ultimately in the stability of the Palota-Zarovia relationship, although the fact pattern is intentionally unclear on whether Palota's interest in surveillance is a sign of any ulterior motive. The environment of tension between the long history of conflict and a future that may benefit from cooperation is

The simulation also presents issues of internal conflicting interests. Although negotiators should, of course, negotiate for the best outcome for their affiliation, sometimes there may be

conflicts of interest, or the “best” outcome for the organization may be unclear. In Zarovia’s case, public influence has fostered the administration’s self-interest in reaching an outcome that appears strong, assertive, and practically patriotic when a better outcome may be to compromise toward diplomacy and economic and political partnership. Alternatively, the Zarovian administration may argue that the best outcome for the administration politically and the best outcome for Zarovia (the state) are one and the same, because the stronger the administration is, the more effective it can be in the long run in implementing pro-cooperative reform. On the Palotan side, there is the potential conflict of interest between the administration’s official position regarding its military interests and the negotiator’s independent knowledge of possible ulterior motives. The Palotan negotiator has conflicting interests to follow the government’s party line, or to be cautious in any negotiations dependent on Palota’s military restraint. Practically, the negotiator doesn’t certainly know Palota’s military intentions, so if the suspected militarism may just be one factor the negotiator considers in the course of negotiations. I have included these conflicts of interest because I suspect that attorneys may sometimes, consciously or not, encounter them, whether the conflict arises because the attorney or client is aware of something the other is not, or due to some more nefarious motive (e.g. if an attorney is likely to get greater fees with option A than option B, while the client is likely to be happier with closing out the deal early under option B).

BATNAs

Zarovia’s perceived BATNA is \$2 billion per year for ten years, or \$40 billion, with the possibility of \$20 billion per year after the WMRC’s decision in 2026. (The \$20 billion per year after 2026 is only a possibility—and not a definite BATNA—in Zarovia’s BATNA calculations

because Zarovia does not know how WMRC will decide.) There is also the possibility of coal in the Rocks, but as it is only a possibility, it is not factored into Zarovia's BATNA.

Palota's BATNA is \$2 billion per year for twenty years, or \$40 billion. WMRC's award of the Rocks to Zarovia in twenty years could lead to several different outcomes, depending on Zarovia's actions. Palota may either (1) continue to make \$2 billion per year indefinitely if Zarovia doesn't ever impact the seabed; (2) continue to make \$2 billion per year indefinitely if Zarovia doesn't impact the seabed prior to 2031, when the bioengineers will have concluded their research; (3) make \$2 billion per year for one to four more years, if Zarovia impacts the seabed in the first four years after the decision (before the bioengineers complete their research); or (4) make nothing more from whalefish ever if Zarovia impacts the seabed immediately upon the WMRC's decision. However, the only sure thing for Palota is that with no agreement in place, Palota will make \$2 billion per year for the next twenty years; the future is uncertain.

BATWAs

Zarovia's BATWA is for Palota to relinquish all of its claims to the Rocks in exchange for nothing. In this scenario, Zarovia would make \$20 billion per year indefinitely, for a differential of \$160 billion from the BATNA for the first 20 years, and a differential of \$20 billion per year thereafter. Zarovia would also display the political clout which the administration so strongly desires.

Palota's BATWA is for Zarovia to relinquish all of its claims to the Rocks and for Zarovia to pay Palota the \$20 billion the negotiator is authorized to spend. (Although it is highly unlikely that Zarovia would pay \$20 billion and leave the rocks entirely, there could be such a situation if Zarovia paid \$20 billion for a license to the genetic code of the engineered whalefish, for example). In this case, Palota could keep the \$20 billion and generate \$2 billion per year

indefinitely (because Zarovia relinquished its claim and WMRC won't award the islets to Zarovia in twenty years), for a total of \$60 billion over the first twenty years and \$2 billion per year thereafter. Alternatively, Palota could invest the \$20 billion in the genetic research and generate an additional \$2 billion per year starting in 2011 from the whalefish industry on the eastern coast of Palota coast, for a total of $(\$2 \text{ billion} \times 20 \text{ years from the Rocks}) + (\$2 \text{ billion} \times 15 \text{ years from the eastern coast}) = \70 billion over the first twenty years, and \$4 billion per year thereafter.

Positions

In reflection of the economic and political interests and the corresponding BATNAs described above, Zarovia's likely initial position will be aggressive: The Rocks are Zarovian and Palota has pushed Zarovia around long enough. Zarovia clearly owns the Rocks (we have people living there!) and their MCZ, so why don't we just get this settled now. However, in the spirit of goodwill, we are willing to offer a nominal settlement to close out the matter.

Palota's initial position will be either a well- or poorly disguised enthusiasm to settle the matter quickly—Palota wants to secure some rights while it still has bargaining power. Palota's position is, we want the seabed, but again, the driving interest is to secure something better than the BATNA while it still can.

Other Factors

In real life, many other factors would influence a negotiation between two states; as with any negotiation or issue, legal or not, the basic facts and figures of the dispute do not exist in a vacuum. Some factors may include:

- Cross-cultural differences: As we studied in class, one culture may be more reserved while the other more direct, as American culture is. Related to cross-cultural differences

are linguistic differences: One language may be extremely structured and hierarchical (e.g. Japanese, Korean), while other are less so. Being attuned to these nuances is key to the negotiator's successful and productive interaction, both in the negotiator's own speech as well as in the negotiator's reception to the other party's speech, inasmuch as the negotiator should be aware of linguistic differences and not take it personally if the other party accidentally speaks in informal tones (although for situations like this simulation, the state department should have a translator and be culturally competent—cultural incompetence from a leading state department could be a sign of disorganization).

- **Personal diplomacy styles/tactics:** The range of personalities in recent U.S. Secretaries of State alone indicates that foreign relations officers pursue state interests in very different ways, depending on factors including the officer's past relationship with the foreign state, the attitude of the sending state's administration (i.e., what your bosses want), academic/professional backgrounds and life experiences, and personality type. As we studied in Myers Briggs, personality type is inextricable from a negotiator's job because the nature of a negotiator's job and the human interaction it requires renders it impossible to divorce the personality from the professional activity.
- **Initial invitation to negotiate:** Parties may draw assumptions from who scheduled the meeting and how the invitation was phrased. For example, if the meeting was scheduled with urgency by a high level official, the responding party may surmise that the other party is desperate for something in the responding party's possession, creating a presumption of an initial advantage.

- Prior history with the other state, recent and historically: Although little historical detail is provided in this simulation, in real life, complex histories of interaction in all arenas (i.e., not just economic and political, but religious, educational, pop culture, etc.) and with other third party states influence negotiations. For example, in the Japan-Korea dispute, the cultural popularity of Korean soap operas in Japan is said to be softening the political conflict surrounding Japan's denial of citizenship to second-, third-, fourth-generation ethnic Korean Japanese. In terms of interactions with third parties influencing the negotiation, the U.S. involvement in Iraq has undoubtedly influenced the reception of U.S. interests by other states.
- Other state interests: Again, this case addressed only the political and economical, but a state may have several other interests in mind that could not be fully addressed in this fact pattern, such as ecological concerns against deep sea drilling.
- Legal foundation (case law, customary law, statutes): In this simulation and other negotiations, the legal foundation for the negotiator's position is another tool which the negotiator would need to know, whether it is weak or strong. This is in line with the negotiation tenet that the negotiator should have as much information as s/he can, whether good or bad, because knowing the weaknesses and strengths best equips the negotiator to design the negotiation strategy, to direct the course of the negotiation, and to anticipate the arguments of the opposition.

Possible Resolutions

There are numerous permutations for possible resolutions to this simulation, the most likely of which I will discuss below.

1. Split the islets so each state gets one Rock: This may be the initial inclination, because there are two rocks, but this does not resolve the conflicting interests because both parties' primary economic interest is in the entirety of the seabed. For Zarovia, the oil may be anywhere in the 8,000 square mile area, so taking just one Rock would be a risk. For Palota, taking one Rock would leave the adjacent MCZ vulnerable to drilling, which would disrupt the seabed diminishing at least half, if not all, of the whalefish. In terms of political interests, both states (and Zarovia in particular) may view such a compromise as a "give" and too lenient in light of the political history.

2. Split the land and the MCZ: Another initial inclination may be to split the Rocks so that one party gets the land while the other gets the MCZ. Although both parties do have some interest in the Rocks (Zarovia for coal potential and political appearances, Palota for military surveillance), again, neither party is likely to agree to getting the land only without any conditions attached to the seabed. Palota may be willing to take the land and give Zarovia the water with the condition that the seabed not be disrupted, but Zarovia would likely not go for it, considering the interest in deep sea drilling. Zarovia may be willing to take the land if Palota would grant Zarovia drilling rights, or agree to a condition that the water grant is pursuant to Zarovia finding coal in the rocks, and that if its discovered that the rocks don't hold coal, then ownership switches. Palota may be acquiesce to the latter condition if the time limit is correct: For example, if the initial agreement is for 25 years, or 24 years with \$1 billion in cash, and so on, then Palota will have enough time to develop the genetically engineered whalefish, ensuring perpetuation of its fishing industry, while Zarovia – even if it misses out on \$20 billion per year for the initial term of the agreement – is guaranteed to \$20 billion at some point.

3. Time split: Alternatively, instead of splitting the area geographically, the parties can agree on a time split, with or without conditions/money. For example, Zarovia can agree to grant Palota rights to the entire area for the first ten years only with \$15,000 in cash. With this direction, Palota would make \$2,000 per year indefinitely (\$15,000 invested in the engineers). Zarovia would make only \$20,000 the first ten years, but then \$20,000 every year after that. This agreement may be politically distasteful to the Zarovian administration because it calls for an immediate, albeit temporary, drop of the claim, but if the administration can get past the political pressure, in the long run both parties would benefit. If the issue is political pressure, Palota could perhaps allow Zarovia to remain on the rocks, at least, mirroring the split discussed above. Regardless of the details of the concessions required to make it work, a resolution that allows (1) Palota to continue its fishing activity, whether at the Rocks or via successful bioengineering for the whalefish's relocation and (2) Zarovia to mine the seabed for oil is the best way of "maximizing the pot" so that both states can exploit the Rocks fully. Essential to attaining this goal is successful management of—and perseverance over—political pressures. In "Getting to Yes" terms, the negotiator needs to separate the *interests* from the *position* (the political baggage), which is not to say that political interests should be disregarded completely, but merely that they should not stall a negotiation in position-oriented and intractable contentiousness.

4. Actual case: The actual case on which this is based, the Japan-Korea dispute over the Liancourt Rocks/Tokdo (in Korea)/Takeshima (in Japan) is an ongoing dispute. Korea offered to relinquish the Exclusive Economic Zone around the rocks in exchange for possession of the rocks, but Japan refused. A Japanese prefecture recently held "Takeshima Day," and Korea responded with the same. There is no resolution yet evidence in this dispute, but the growing

cosmopolitan youth population, as well as the distance in time from the occupation period, may ease a resolution in the future.