

## CHAPTER 13

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# ARGUING, BARGAINING, AND GETTING AGREEMENT

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### 1. INTRODUCTION

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In the public policy-making arena, stakeholders and decision makers are engaged in a never-ending process of trying to influence each other's thinking and behavior. Sometimes, this is accomplished through option one: conversation in which one party seeks to convince another to do something (i.e. lend support, change their mind) on the basis of evidence or argument. More often than not, though, an exchange of views—no matter how elegantly presented—is insufficient to alter strongly held beliefs. Because of this, many parties resort to option two—hard bargaining—in which threats, bluff, and political mobilization are used to gain the outcomes they want. Particularly if political power is unevenly distributed, powerful parties can often use hard bargaining to pursue their objectives. In many democratic contexts, however, confrontations that flow from hard bargaining lead to litigation (or other defensive moves), which typically generates less than ideal results for all parties.

There is a third option: “mutual gains” negotiation, or what is now called consensus building. In this mode, parties seek to make mutually advantageous trades—offering their “votes” in exchange for a modification of what is being proposed or for a promise of support on other issues. So, while arguing and bargaining—the first two approaches to dealing with conflict in the public policy arena—can sometimes produce the desired results, they often generate a backlash or lead to sustained confrontation. Only when parties feel that their core interests have

been met, they have been treated fairly, and they know everything possible is being done to maximize joint gains (i.e. through consensus building) will agreements be reachable and durable enough to withstand the difficulties of implementation.

The dynamics of deliberation, bargaining, and consensus building in the public arena have been reasonably well documented (Gutmann and Thompson 1996). These published findings suggest that well-organized dialogue on matters of public policy can improve the climate of understanding and increase respect for differences in perspective, but will not lead to changes in policy or shifts in the balance of political power (Yankelovich 1999; Straus 2002; Isaacs 1999). On the other hand, there is some evidence to indicate that carefully structured consensus-building efforts can produce fairer, more efficient, wiser, and more stable results—even when political power is not distributed evenly (Susskind and Cruikshank 1987; O’Leary and Bingham 2003). That is, that negotiation can actually lead to shifts in policy or political alignments. However, obstacles to the organizational learning required to institutionalize consensus building are substantial, and the documentation that does exist points to a relatively small number of successful consensus-building efforts in the public arena (Schön and Rein 1994). Further, attempts by others elsewhere in the world to capitalize on and apply what has been learned in the United States about negotiation and consensus building are only just beginning (Centre for Democracy and Governance 1998).

Most bargaining and negotiation theory postulates interaction between two parties. In the public policy arena, however, policy-related exchanges involve many (non-monolithic) parties represented by agents (i.e. elected spokespeople or unofficial representatives). As such, multiparty, multi-issue negotiations tend to be much more complicated than negotiation theorists suggest. Indeed, getting agreement in a multiparty situation often requires someone (other than the parties themselves) to manage the complexities of group interaction. This has led to the emergence of a new profession of public dispute mediation (Susskind and Cruikshank 1987). Indeed, in many contentious settings, having wasted time and money on recurring public policy disputes that have not been settled effectively, participants have sought mediator assistance to reach agreements through collaboration.

In this chapter, I will describe the three options that I have dubbed arguing, bargaining, and getting agreement. I will also highlight what appear to be usefully prescriptive norms of behavior for “combatants” in the public policy arena.

## 2. DIALOGUE AND ARGUMENTATION

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A distinction is sometimes made by those who focus on discourse between dialogue and discussion. The former refers to the exploration of options while the latter refers

to making decisions. Isaacs suggests that dialogue involves listening, respecting what others have to say, suspending judgement (i.e. avoiding the tendency to defend pre-existing beliefs), and voicing reactions. So, the key questions, then, are: how to get others to listen to what we have to say, how to structure a dialogue (or a skillful conversation) to ensure that participants suspend judgement and reflect carefully on what we are saying, and how to control or manage debate to ensure that the most useful exchange of ideas and arguments occurs (Isaacs 1999).

## 2.1 Getting People to Listen

Some people will listen politely to the views of others, no matter how outrageous, because that's what they have been taught to do—as a matter of manners. In most contexts, however, politeness breaks down when passions run high, core values are threatened, or the stakes are substantial. Politeness also breaks down when those speaking are more concerned about the reactions of their constituents or followers to what they are saying than they are about the reactions of their partners in dialogue. In multiparty dialogue, representatives of faction-laden groups play to their supporters. They are more concerned about “looking tough” than they are about convincing the “other side” to go along with their proposals.

Isaacs suggests that the “atmosphere, energy and memories of people create a field of conversation” (Isaacs 1999). Within such fields, he asserts, “dialogue fulfills deeper, more widespread needs than simply ‘getting to yes.’ ” Thus his claim is that the aim of a negotiation may be to reach agreement among parties who differ, but the intent of dialogue is to reach new understandings and, in doing so, to form a totally new basis from which to think and act. In dialogue, Isaacs and others suggest, the goal is not only to solve problems, but to “dissolve them” (Isaacs 1999, 19). The question that must be asked is whether or not dialogue—as opposed to negotiation—can solve problems if nothing is traded and only an understanding of differences (and the basis for them) is enhanced.

## 2.2 Structuring the Conversation

The goal, according to those who see conversation as an end in itself, is to break down politeness and move to a kind of joint enquiry or “generative dialogue.” What motivates such a shift, we must ask, if no decision needs to be made, or no agreement must be reached? The moves necessary to accomplish such a transformation hinge on the capacity of the parties to achieve and maintain a substantial level of self-control. In addition, there seems to be an assumption that the participants care more about convincing others of the merits of what they are saying than they do about achieving

a particular outcome. Unfortunately, this doesn't seem likely to occur in the world of public policy.

Ground rules for constructive deliberation must be internalized or enforced. If the exchange is one-time only, as it often is in the public policy arena, it seems highly unlikely that this can be accomplished (unless each of the participants is an old hand at such exchanges). The conversation must be managed in a way that constantly reminds the participants to listen to and respect each other's views. Often, this is best achieved with the help of a trained facilitator (or by building the capacity of the participants through training). But this only works as long as everyone buys into the idea. It is not clear how to deal with obstructionists who seek only to achieve what they see as a symbolic victory by bringing the conversation to a close. When a key player in the conversation is either out of control or has decided, for strategic reasons, that bringing the exchange to a halt is his or her objective, there is nothing that even the most skilled facilitator can do.

### **2.3 Avoiding Demonization (and Stressing the Importance of Civility) in Debates over Values**

"Interests," as William Ury, an anthropologist and mediator, explains, are "needs, desires, concerns, or fears—the things one cares about or wants. They underlie people's positions—the tangible items they say they want" (Fisher, Ury, and Patton 1983). When conflicts revolve around interests, numerous solutions are possible. Since individuals and groups usually have numerous interests, it is often possible with creativity and hard work to find a deal that satisfies many, if not all of the interests involved. Mutual gains negotiation, or integrative bargaining as consensus building is sometimes called in the theoretical literature, is about advancing self-interest through the invention of packages that meet interests on all sides. However, interests are not always the only thing at stake. Fundamental values may be involved as well.

As mediator Christopher Moore explains, "Values disputes focus on such issues as guilt and innocence, what norms should prevail in a social relationship, what acts should be considered valid, what beliefs are correct, who merits what, or what principles should guide decision-making" (Moore 1986). Values involve strongly held personal beliefs, moral and ethical principles, basic legal rights, and more generally, idealized views of the world. While interests are about what we want, values are about what we care about and what we stand for.

In value-laden debates, to compromise or to accommodate neither advances one's self-interest nor increases joint gains. Compromise, in its most pejorative sense, means abandoning deeply held beliefs, values, or ideals. To negotiate away values is to risk giving up one's identity.

Social psychologist Terrell Northrup details several stages through which value disputes move toward intractability. Intense conflict begins when individuals feel

threatened. The threat is perceived as an awful trade-off: either you survive or I do. In order to maintain belief systems in the face of such threats, the first thing parties do is to engage in a process of distortion. This includes building up the perceived legitimacy of their own claim (in their mind) and tearing down the claims of other(s). Then, individuals (and groups) involved in conflict develop increasingly rigid explanations of their own actions and the actions of others. In order to maintain the integrity of our own belief systems, we stereotype others. Behaviors that we find distasteful in ourselves, we project onto our "enemies." As this process continues, our adversaries become dehumanized and are seen not merely as different, but as inhumane. Such reasoning, carried to its radical end, justifies and supports violent behavior (Northrup 1989, quoted in Susskind and Field 1996).

Northrup's final stage, maintaining the conflict, becomes central to each party's identity. To maintain their own values, the groups in conflict must keep the conflict alive. Ironically, this creates an implicit and often tragic agreement among the parties that Northrup labels "collusion." Over time, groups, cultures, and even nations institutionalize behaviors and beliefs which maintain long-standing conflicts. No wonder dialogue, no matter how skillfully managed, is unlikely to produce agreement in situations in which fundamental values are at stake.

Northrup suggests that there are three levels at which conflicts involving fundamental values and identities can be addressed. At the first level, the disputants may agree on peripheral changes that do not eliminate the ongoing hostilities but alleviate specific problems. For example, in the wake of the killing of two employees at a Planned Parenthood Clinic in Massachusetts, Bernard Cardinal Law of Boston called for a temporary moratorium on sidewalk demonstrations and asked protesters to move their vigils inside churches. At this level, both sides held fast to their basic principles. Pro-life Catholics continued to oppose abortion and support demonstrations. Pro-choice groups continued to support a woman's right to choose abortion. However, when the focus shifted to the goal of minimizing violence, it was possible to reach agreement on specific steps that needed to be taken. Unfortunately, such agreements have little effect on basic value conflicts.

Second-level changes alter some aspects of ongoing relationships, but fundamental values are not challenged or transformed at this level either, at least in the short run. Agreements reached at the second level focus on how the parties will relate to one another over time as opposed to merely how one specific situation or problem will be solved. For instance, in Missouri, the director of an abortion clinic, an attorney opposing abortion, and a board member of a Missouri right-to-life group agreed to meet to discuss adoption, foster care, and abstinence for teenagers. Surprisingly, these groups agreed to support legislation to pay for the treatment of pregnant drug addicts. They also established an ongoing dialog that transformed the way they dealt with each other. They began to meet individually, on a personal basis, to work on problems they had in common.

Third-level change is far more difficult. This kind of change involves shifts in the identities that people hold dear. Not only are working relationships changed at this level, but the way people view themselves is altered. Northrup uses the example

of psychotherapy to illustrate. In psychotherapy, an individual's core constructs are examined, faulty constructs are discarded, and the individual develops a transformed sense of self over time. Changes at the first and second levels frequently set the stage for third-level changes (Northrup 1989, cited in Susskind and Field 1996).

## 2.4 Can Anyone be Convinced to Do Something That is Not in their Best Interest?

The key question for those who believe that “differences” can be worked out through conversation is whether or not anyone can be convinced to do or support something that is not in their own best interest. It seems unlikely. Rhetorical methods, however, can be very powerful. They basically boil down to (1) argumentation with reference to logic; (2) argumentation with reference to emotion; (3) argumentation with reference to history, expert judgement, or evidence; and (4) argumentation with reference to ideology or values. In each case, the person who is trying to do the convincing is basically asking the object of their persuasion (their audience) to hold predispositions in abeyance and remain open to new ideas, new evidence, or new interpretations.

## 2.5 Influencing the Opinions of Others Through the Use of Rhetoric

It is useful to think of rhetoric in terms of a speaker, an audience, and a message.<sup>1</sup> At the outset, the speaker needs to convince the audience that he or she is trustworthy and knowledgeable. This gives the audience a reason to listen to and, perhaps, believe what the speaker is saying. An audience that ignores the speaker cannot be reached. Thus, establishing some emotional connection with the audience is important. Of course, there is a danger the audience can become too emotionally involved. This can lead to the blind acceptance of arguments. While such persuasiveness might seem advantageous in the short run, concurrence reached in this way will likely be temporary, evaporating once emotions are no longer running high and more thoughtful analysis takes place.

A rhetorical message must be articulated in a language an audience can understand. The most successful rhetoricians try to argue a viewpoint that is usually mildly discrepant with what an audience believes. An audience doesn't want to look foolish—holding an opinion that is demonstrably wrong—but they aren't going to swing across a wide spectrum either. While they usually search for evidence that

<sup>1</sup> Many thanks to Noah Susskind for offering suggested language for this section of the chapter.

verifies what they already believe, most people spend more time scrutinizing an argument that differs radically from their own (Kassin 2004). If the speaker is preaching to the choir, the choir tends to expend less effort finding fault with the message.

Context and expectations are obviously important. The choice of a rhetorical approach must match the situation. In some instances, it makes sense to lean more heavily on emotion than on logical proof, while in other situations the reverse is true. If there is a clash of ideas or viewpoints, it sometimes makes sense to build upon an opponent's foundational beliefs, but draw different conclusions—pointing out how the other side has misinterpreted the situation or made incorrect leaps of judgement. Convincing an audience that you are right and your opponent is wrong can take several forms. In a dialogue, one side can try to convince the other that they are being a hypocrite because their beliefs, actions, or conclusions contradict each other. They can claim that the other side's beliefs will lead to dangerous outcomes or that their beliefs are fundamentally wrong. They can take a milder course claiming that the other side's beliefs are correct, but their conclusions are wrong. Finally, they can make reference to a conventional body of wisdom, arguing that everybody agrees that they are right so that their opponent must be wrong.

## 2.6 Using Evidence to Make Arguments on “their Merits”

In the context of public policy debates of various kinds, advocates are very likely to utilize scientific or technical information to bolster their arguments (Ozawa 1991). There are many analytic tools and techniques, including cost–benefit analysis, risk assessment, and environmental impact assessment, that are often used to justify one interpretation of what a particular policy or proposal will or won't accomplish. While these techniques are fairly well developed, they are not immune from criticism. So, if one party doesn't like the evidence offered by an adversary to justify a particular public action, he can either challenge the relevance of that particular technique or suggest that the technique was applied incorrectly. Since almost all such studies hinge, at least in part, on non-objective judgements of one kind or another (i.e. geographic scope of the study, timeframe for the study, etc.), it is possible to accept the relevance and the legitimacy of a study, but show how key assumptions could have been made differently, and if they were, how the results would vary (Susskind and Dunlap 1981).

Advocates of “improved” public discourse press all sides to make arguments “on their merits,” that is, to put aside claims based solely on ideology or intuition and to rely, instead, on arguments built on “independent” scientific evidence. Unfortunately, all too often, this leads to the “battle of the printout” as each side appropriates carefully selected expertise to support its a priori beliefs. In the current era, in which relativism appears to trump positivism, the prospect of “dueling experts” leads

some to suggest that scientific or technical evidence might just as well be ignored entirely.

## 2.7 The Prospects of Joint Fact Finding

If all the parties in a public policy dispute felt they could rely on a particular bit of shared scientific or technical analysis, and agreed to use it to inform a public decision, it would probably have to be generated in a way that all parties had a hand in formulating, by analysts all sides were willing to accept. That is pretty much the idea behind joint fact finding. Since partisans in public policy disputes are unlikely to defer to experts selected by their opponents, and since the idea of unbiased or independent expertise is more or less unconvincing, the only alternative—if technical input is going to be considered at all—is analysis generated by experts chosen and instructed jointly by the partisans.

Joint fact finding can most easily be understood in the context of the consensus-building process (that will be described in more detail below); however, it can also be presented on its own terms and can be used in a dialogue process that it is not necessarily aimed at achieving agreement, but only at enhancing understanding. Joint fact finding begins with the framing of a set of questions. The choice of analytic methods, the selection of experts, even strategies for handling non-objective judgments (including key parameters like timeframe, geographic boundaries, and strategies for dealing with uncertainty) must all then be made in a credible fashion. While joint fact finding rarely settles policy debates, it ensures that useful information, in a believable and timely form, is considered by the parties (Susskind, McKeavner, and Thomas-Lovmer 1999).

Unfortunately, even when joint fact finding is used as part of carefully structured public deliberations, dialogue—no matter how well facilitated—is unlikely to lead to agreement on public policy choices. Argumentation, no matter how skillfully presented or corroborated by expert advice, will rarely cause partisans in public policy debates to put their own interests (as they see them) aside.

## 3. HARD BARGAINING

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Hard bargaining refers to a set of classical negotiation tactics. In an effort to convince someone to do “what you want, when you want, the way you want,” hard bargainers try to limit the choices available to their negotiating partners by making threats, bluffing, and demanding concessions. In a hard bargaining context, it also helps to have more “political power” than the other side. These classical



negotiating techniques are still very much in vogue even though consensus-building or mutual gains approaches to negotiation have emerged as a highly desirable alternative.

### 3.1 Hard Bargaining in Two-party Situations

Most prescriptive advice about negotiation assumes a two-party bargaining situation modeled on traditional buyer–seller interaction (Cohen 1982). That is, it assumes two monolithic parties engaged in a one-time-only face-to-face exchange in which each party seeks to achieve its goals at the expense of the other. Such a “zero-sum” approach assumes that the only way one side can get what it wants is by blocking the other’s efforts to meet its interests. Note that this presumes that each bargainer is monolithic, or at least has the power to commit (regardless of how many people they might represent). So, agents are not involved.

Hard bargaining follows a well-established pattern. First, one side begins with an exaggerated demand (knowing full well that it will not be acceptable to the other). This is followed by an equally exaggerated demand by the other side. Openings are sometimes coupled with bluff and bluster—indicating that if the initial demand is not accepted, negotiations will come to an immediate halt. Of course, this is not true. Concessions continue to be traded as each side reduces its demand in response to reductions offered by the other. Along the way, each attempts to convince the other that the prior concession was the last that will be offered. They also plead their case on occasion, trying to gain sympathy. During such exchanges, little or no attention is paid by either side to the arguments put forward in support of the other’s demands. After all, if one side admitted that the other’s claims were legitimate, they would have to make the final (and probably the larger) concession. Finally, the parties either slide past an acceptable deal or reach a minimally acceptable agreement.

### 3.2 Using Threats to Win Arguments in the Public Arena

In a public policy context, it is not clear that the use of threats is very effective. Hard bargaining in the public policy arena only succeeds when the other side(s) agree(s) to go along. Threats undermine legitimacy, and in the absence of legitimacy, large numbers of people tend to refuse (actively or passively) to comply with whatever agreement is worked out by their representatives. Since threats are usually viewed as illegitimate (or, at the very least, unfair), this can create opposition and instability, requiring larger investments in enforcement to achieve implementation or compliance with whatever public policy decision is ultimately made. In addition, threats set an undesirable precedent. They encourage retaliation by others the next time around.

In a bilateral context, threats can be aimed directly at a particular party. In a multilateral context (more common in the public arena), threats can cause a backlash in unexpected quarters by contributing to the formation of unlikely blocking coalitions.

### 3.3 Does Bluffing Work?

Bluffing typically involves threats in the absence of power. That is, the one making the bluff knows that they do not have the capacity or the intention to follow through. If they have the power, why bluff? Bluffing is usually a bad idea in a bargaining context. A bluff may be met with resistance on the other side, just to see whether the claim is authentic or not. When it is not real, it undermines future credibility. This is a high price to pay. The negotiation literature dealing with bluffing suggests that it is usually an ineffective practice (Schelling 1980).

### 3.4 Getting the Attention of the “Other Side”

In what is clearly a hard bargaining situation, it may be necessary to take dramatic action (i.e. adopt a flamboyant opening gambit) to get the attention of the other side, especially if there is an imbalance of power and the “less powerful party” is trying to frame the negotiation in a way that is most helpful to them. Less powerful parties may open with a take-it-or-leave-it offer, although they should only do this if they really mean to walk away. Sometimes less powerful groups will try to stage a media event to bring pressure on their potential negotiating partners. Of course, this often stiffens the resolve of the party that is the target of such tactics. Sometimes, in a hard bargaining situation, one side will attempt to send what is called a back-channel message to the other side (through a mutually trusted intermediary) to see if they can get a better sense of the “real” Zone of Possible Agreement (ZOPA) or what economists sometimes call “the contract curve.” This avoids face-saving problems later when threats are ignored (Raiffa 1985).

### 3.5 The Results of Concession Trading

When hard bargaining involves outrageous opening demands on either side, it is hard to explain to the constituencies represented (who follow the whole process) why the final agreement should be viewed as a victory. It will tend to look like what it is—the minimally acceptable outcome rather than a maximally beneficial one (for either side). Not only that, but an outrageous opening demand can sometimes

cause a potential negotiating partner to walk away, figuring incorrectly that there is no Zone of Possible Agreement (ZOPA), when in fact, there is lots of room to maneuver. Exaggerated opening demands sometimes create a test of will (especially when one or both negotiators are trying to prove how tough they are to their own constituents). This can make the negotiation more contentious than it needs to be. Emotions can be triggered. These can outstrip logic, leading to no agreement when in fact, one was possible. There is a good chance, if the parties stop listening to each other entirely, that they will slide right past a minimally acceptable deal because one or both sides assumes that the back-and-forth of concession trading is still not over.

### 3.6 Power and Hard Bargaining

There are many sources of power in negotiation, although in a hard bargaining situation only a few are relevant (Fisher 1983). The first, obviously, is a good “walk away” alternative. The party with the best BATNA (Best Alternative to a Negotiated Agreement) has the most leverage. If one party can muster a coalition, it can sometimes increase its bargaining power by bringing members into a supportive coalition, which can alter the BATNA of the other side (or increase what is available to offer to the other side). I am avoiding reference to physical coercion since it seems out of place in a public policy context, but obviously there may be occasions where decisions are made because people are afraid for their safety. Finally, information can sometimes be used as club. If one side’s reputation will be tarnished if critical information is released, then this becomes a source of power in hard bargaining. The key point about hard bargaining is that the parties do not care about the relationships with which they are left once the negotiation is over. Nor do they care about the trust that may be lost between them, or the credibility they lose in the eyes of the public at large. When these matter, hard bargaining must give way to consensus building.

## 4. GETTING AGREEMENT

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Whereas hard bargainers assume, in zero-sum fashion, that the best way to get what they want is to ensure that their negotiating partner does not get what he or she wants, consensus building proceeds on a very different assumption: namely, that the best way for a negotiator to satisfy his interests is to find a low-cost way (to him) of meeting the most important interests of his negotiating partner. As the number of parties increases, which it often does in public policy disputes, the same principle

applies. Dispute resolution theoreticians have dubbed this the “mutual gains approach” to negotiation (Fisher, Ury, and Patton 1983; Susskind and Field 1996; Lewicki and Litterer 1985). So, hard bargaining and consensus building are both forms of negotiation, but consensus building puts more of a premium on (1) maximizing the value (to all sides) of the agreement reached; (2) leaving the parties in a better position to deal with each other in the future and reducing the costs associated with implementing agreements; (3) reducing the transaction costs involved in working out an agreement; and (4) adding to the trust and credibility that the parties have in the eyes of the community at large as a product of the negotiations.

It is easiest to understand consensus building in multiparty situations if we first review the application of “mutual gains” theory to a two-party context.

## 4.1 The Mutual Gains Approach to Negotiation

There are four steps in the mutual gains approach to negotiation. They are depicted in Fig. 13.1.

### *Preparation*

In a hard bargaining context, negotiators spend most of their preparatory time trying to decide how much to exaggerate their initial demand, what their fall-back proposal will be when the other side objects, and which strategies they can employ to increase their negotiating partner’s level of discomfort—so that they will settle for less just to end the exchange. The mutual gains approach, on the other hand, calls on negotiators to (1) clarify (and rank order) their interests; (2) imagine what the interests of their negotiating partners are; (3) analyze their own BATNA and think about ways of improving it before the negotiations begin; (4) analyze their partner’s BATNA and think about ways of raising doubts about it if it seems particularly good; (5) generate possible options or packages of options for mutual gain; (6) imagine the strongest arguments (an objective observer might make) on behalf of the package that would be beneficial to the negotiator; and (7) ensure that they have a clear mandate regarding the responsibilities and autonomy accorded to them by their own constituents or organization. This requires a substantial investment of time and energy. Moreover, it usually implies organizational and not just individual effort.

### *Value Creation*

At the outset of a mutual gains negotiation, it is in the interest of all parties to take whatever steps they can to create value, that is, to “increase the size of the pie” before determining who gets what. The more value they can create, the greater the chances

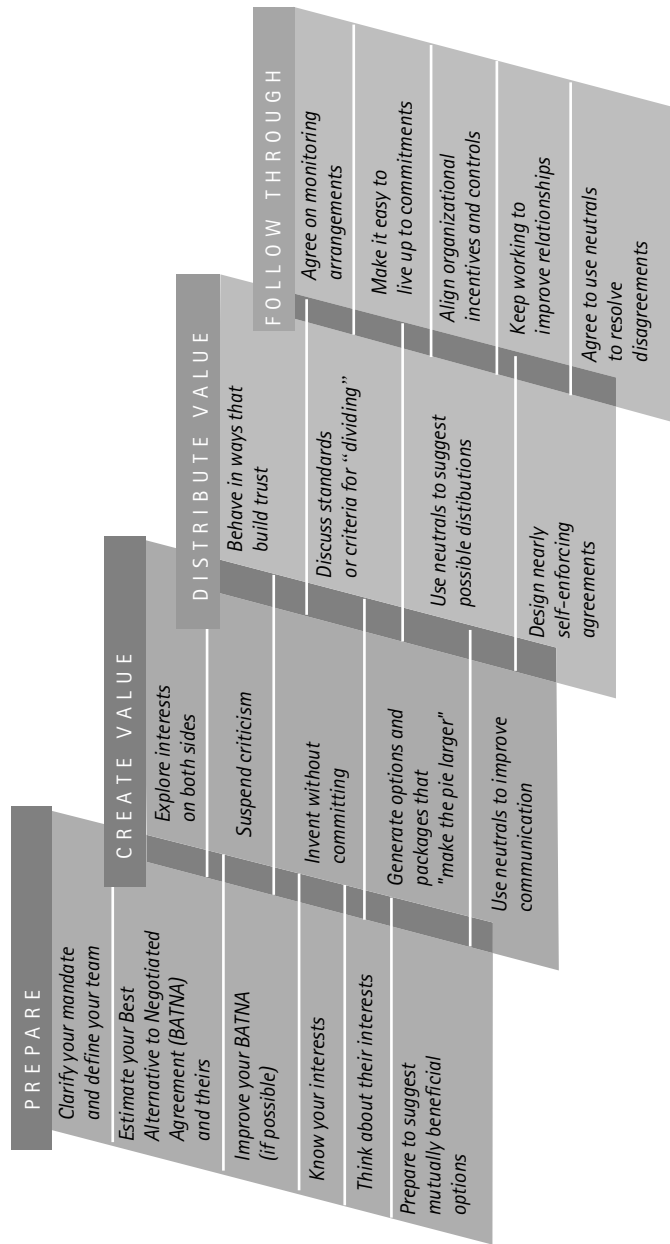


Fig. 13.1. Mutual gains approach to negotiation

Source: Susskind, McKernan, and Thomas Lamar 1999.

that all sides will exceed their BATNA (and thus find a mutually advantageous outcome). Value creating requires the parties to play the “game” of “what if?” That is, each party needs to explore possible trades to determine which would leave them better off. So, one side might ask the other, “What if we added ‘more A’ and assumed ‘less B’ in the package? Would you like that better?” The other might say, “Yes, that’s

possible, but we would need to actually double the amount of A and not decrease B by more than 10 per cent. And, I'd need to be able to count on some C being included as well." The back-and-forth is aimed, obviously, at finding a package that maximizes the total value available to the parties. By working cooperatively to identify things they value differently, the negotiators can make mutually advantageous trades. For this to work in practice, they need to be willing to "invent without committing," that is, to explore a great many options before going back to their constituents for final approval.

### *Value Distribution*

Having generated as much value as possible, the negotiators—even in a mutual gains context—must then confront the difficult (and competitive) task of dividing the value they have created. At this stage, gains to one constitute losses to the other. Thus, the mutual gains approach should not be, as it often is, called a "win-win" approach to negotiation. There is no way for both sides to get everything they want in a negotiation. Rather, mutual gains seek to get both (or all) sides as "far above" their BATNA as possible and to maximize the creation of value. In addition, the parties need to be able to explain to others why they got what they got. This entails a discussion of the reasons that the figurative "pie" is being distributed the way it is. Both sides need to be able to go back to their organizations (or constituents) and explain why what they got was fair. Each party has an incentive to propose such criteria so that the others will be able to agree to what is being proposed. No one is likely to accept voluntarily a package that leaves them vulnerable to the charge when they return home that they were "taken."

### *Anticipating the Problems of Implementation*

Even though the parties to a mutual gains negotiation are almost always satisfied with the outcome (or they would not have agreed to accept it), they still need to worry about the mechanics of implementation. Often, particularly in the public policy world, the make-up of groups changes over time. Indeed, fluctuations in elected and appointed leadership are to be expected. This means that negotiators cannot depend on good relationships alone to ensure implementation of agreements. Instead, prior to signing anything or finalizing a package, the parties must invest time in crafting the best ways of making their agreement "nearly self-enforcing." This may require adding incentives or penalties to the terms of the agreement. In the public policy arena, informally negotiated agreements are often non-binding. However, they can be grafted onto or incorporated into formal administrative decisions, thereby solving the implementation problem. It may also be necessary to identify a party to monitor implementation of an agreement or to reconvene the parties if milestones are not met or unexpected events demand reconsideration of the terms of an agreement. All of this can be built into the agreement if

relationships are positive and trust has been built during the earlier stages of the process.

## 4.2 Psychological Traps

Even mutual gains negotiators are susceptible to falling into a range of psychological traps, although they are less likely to be trapped than hard bargainers. These traps go by a variety of names—"too much invested to quit," "reactive devaluation," "self-fulfilling prophecy," and others (Bazerman and Neale 1994; Kahneman and Tversky 2000). They grow out of the psychological dynamics that overtake people in competitive situations. The best way to avoid or escape such difficulties is to retain perspective on what is happening—perhaps by taking advantage of breaks in the action to reflect with others on what has occurred thus far. Substantial preparation is another antidote. Negotiators are less likely to give in to their worst (irrational) instincts if they have rehearsed carefully and tried to put themselves "in the shoes" of the other side (Ury 1991). While there is no guarantee that a mutual gains approach to negotiation will succeed, by its very nature it involves cooperation as well as competition. It also puts a premium on building trust. These are useful barriers to the paranoia that so often overwhelms hard bargainers.

## 4.3 The Impact of Culture and Context

The mutual gains approach to negotiation is viewed somewhat differently in various cultural contexts (Avruch 1998). There are well-documented indigenous dispute-handling techniques used in cultures in Africa, Asia, and Latin America to generate community-wide agreement on a range of public policy matters (Gulliver 1979). Even indigenous peoples in North America share a tradition of community-wide consensus building (Morris 2004). There are hard bargaining oriented cultures, however, that are suspicious of the mutual gains approach to negotiation. Even in these cultures, however, while business negotiations retain their hard bargaining character, there is ongoing experimentation with consensus-building approaches to resolving public arena disputes.

## 4.4 The Three Unique Features of Multiparty Negotiation

As noted above, most public policy disputes take place in a multiparty context. There are usually proponents who want to maintain the status quo. Opponents inevitably emerge whose interests run in different directions. These opponents may

be unified in their opposition, but more often than not they are likely to have their own (separate) reasons for protesting. Then, one or more government agencies is cast as the decision maker(s) in either a regulatory (administrative), legislative, or judicial role (Susskind and Cruikshank 1987). Indeed, multiple levels and agencies of government can be involved. Ultimately, still other groups are interested bystanders, waiting to see what will happen before they jump in on one side or another.

As the number of parties increases, the complexity of the negotiations increases. Most public policy disputes involve many parties, talking (sometimes at cross-purposes) about a range of issues. Generating agreement in such contested circumstances is not easy. Someone needs to bring the “right” parties to the table. Ground rules for joint problem solving must be agreed upon. Believable information needs to be generated. The conversation needs to be managed, often in the glare of media attention. All the legal and administrative conventions that are already in place, guaranteeing certain groups access to information and others rights as well, have to be observed. Any effort at consensus building has to be superimposed on this underlying legal and administrative structure. Assuming the powers-that-be are willing to go along with an unofficial effort to generate consensus, the three most difficult problems in any multiparty context are: (1) managing the coalitional dynamics that are sure to emerge; (2) coping with the mechanics of the group conversation that makes problem-solving dialogue and decision making so difficult; and (3) dealing with the kaleidoscopic nature of the BATNA problem as alternative packages are proposed (Susskind et al. 2003). When some or all of the parties are represented by lawyers or agents, the difficulties are further increased.

## 4.5 The Steps in the Consensus Building Process

The use of consensus building (i.e. mutual gains negotiation in multiparty situations focused on matters of public policy) is well documented (Susskind, McKernan, and Thomas-Larmer 1999). Indeed, “best practices” have begun to coalesce (SPIDR 1997). They are perfectly consistent with the spirit of deliberative democracy outlined in the political theory literature (Cohen 1983; Gutmann and Thompson 1996; Barber 1984; Dryzek 2000; Mansbridge 1980; Fung 2004). However, it is important to note that they are meant to supplement representative democratic practices, not replace them (Susskind and Cruikshank 1987). The five steps in the consensus-building process are:

### *Convening*

Usually, a consensus-building process in the public sector is initiated by an elected or appointed official or by an administrative/regulatory agency. This person or group is



called a convener. The convener hires an external neutral, a facilitator or mediator, to help determine whether or not it is worth going forward with a full-fledged collaborative process. As part of that determination, the neutral prepares a Conflict Assessment (sometimes called an Issue Assessment, or just an Assessment). This is a written document with two parts. The first section summarizes the results of off-the-record interviews with all (or most) of the relevant stakeholders in the form of a “map of the conflict” (Susskind et al. 2003, 99–136). The second part, assuming the Assessment results suggest that the key parties are willing to come to the negotiating table, is a prescriptive section with a proposed list of stakeholding groups that ought to be invited (by the convener), a proposed agenda, work plan, timetable, budget, and operating ground rules. By the time this is submitted to the convener, it has usually been reviewed in detail by all the stakeholders who were interviewed. A Conflict Assessment, in a complex public dispute, might be based on fifty to seventy interviews. By the time the convener sends out letters of invitation, it is usually clear that the key groups are willing to attend at least the organizing session. At that point, the participants are usually asked to confirm the selection of a professional “neutral” (i.e. a facilitator or mediator) to help manage the process and to sign the ground rules that will govern the work of the group.

### *Signing on*

When stakeholder groups agree to participate in a consensus-building process, they are not committing to a particular view of the conflict or a specific agreement architecture. They usually are, however, asked to accept a work plan, a timetable, some way of dividing the costs associated with the process, and as mentioned above, ground rules that oblige them to negotiate “in good faith.” When they confirm the selection of a mediator or a facilitator, they are typically asked to agree to an approach to working together, including ground rules restricting interactions with the press, a clear assignment of responsibility for preparing written meeting summaries, and the expectations that each participant will keep his or her constituency informed about the group’s progress and prepare appropriately for meetings.

Often, participants are encouraged to select alternates to stand in for them on a continuing basis if they cannot be present.

### *Deliberation*

Deliberations are guided by the professional neutral following the agreed-upon ground rules and work plan. Often, a consensus-building process will mix some sessions at which information is presented for group review, some at which brainstorming of possible “solutions” or “ideas for action” are discussed, and some at which “outside experts” are invited by the group to answer technical questions (following the joint fact-finding process described earlier). Often, a large group

will create subcommittees to do some of these things and bring work products back to the full group for discussion.

Consensus-building deliberations follow the mutual gains approach to negotiation outlined above. Because there are many parties, the process can be extremely complicated.

### *Deciding*

Consensus-building efforts do not conclude with a vote. Unlike traditional group decision making, governed by majority rule, consensus building seeks to achieve unanimity (but most often settles for overwhelming agreement once all the parties concur that every reasonable effort has been made to respond to the legitimate interests of all the stakeholders). It is up to the neutral to frame the decision-making choices put before the group. These usually take the form of a question, "Who can't live with the following ...?" Those who object are obligated to propose further changes or additions that will make the proposed package acceptable to them without losing the support of the rest of the group. If they cannot suggest such modifications, consensus has been reached. The consensus might not be implementable if a key group, with the power to block, refuses to support the agreement. The decision rule in a consensus-building process is up to the group and must be articulated at the outset of their deliberations.

### *Implementing*

The product of ad hoc consensus-building efforts (including those initiated by governmental conveners) is invariably a proposal, not a final decision. Whatever is suggested must be acted upon by those with the relevant authority to do so. Thus, the product of most consensus-building efforts, no matter how detailed, is almost always subject to further review and action by elected or appointed officials. Of course, were those officials significantly to modify the proposal, the groups involved would disavow their support. And, the agencies themselves typically participate (usually through their staff) in the entire consensus-building effort. So, whatever their concerns might be, they should have been addressed by the group.

Participants in negotiated agreements try to produce "nearly self-enforcing agreements." This can be done by laying out a range of contingent commitments that will come into play only if hard-to-estimate events occur or milestones are reached. Sequences of reciprocal agreements can be spelled out along with monitoring requirements, incentives for performance, and penalties for non-compliance. All of these must then, of course, be incorporated into official actions (i.e. become additional terms added to a contract, permit, license, or administrative decision).

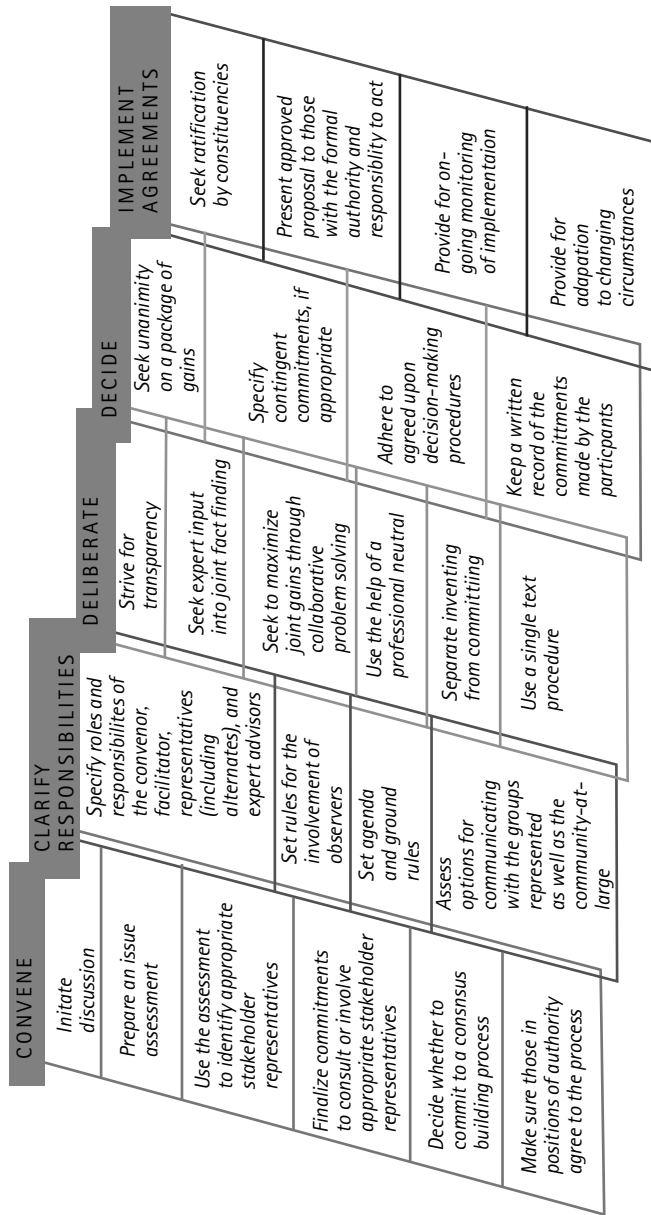


Fig. 13.2. Consensus building: essential steps

Source: Susskind, McKernan, and Thomas Lamar 1999.

## 4.6 The Role of Professional Neutrals

The person or group selected by the convener is often (but not always) tapped by the full group to serve as the manager of the consensus-building effort, if such a process goes forward. Over the past twenty years, the number of people trained to manage such conflict resolution efforts has increased rapidly. The Association for Conflict Resolution (ACR) is one of several professional associations of neutrals in the United States who do this kind of work ([www.acrnet.org](http://www.acrnet.org)). There are degree programs at more than a dozen universities in the United States that offer training in facilitation, mediation, and other dispute-handling skills. The Code of Ethics of the ACR defines a professional neutral as someone who is forbidden from taking sides in a conflict or from trying to impose his or her view of what the “best” outcome ought to be (SPIDR 1986). Public dispute resolution has emerged as a subspecialization within the conflict management field (Carpenter and Kennedy 1988; Dukes 1996).

### *Facilitation*

A great deal, but not all of the work done by a professional facilitator takes place “at the table”—when the parties are working face to face (Doyle and Straus 1993). Facilitation of consensus-building efforts involving many parties working on complex issues often requires a team to keep track in written form of the commitments made by the group. Although the facilitator must refrain from taking a stand on the issues before the group, he or she often reframes elements of the conversation, drawing attention to emerging agreement or insurmountable disagreements, and reminding the parties of their commitment to the process ground rules.

### *Mediation*

Much of what happens in consensus building, particularly what often seem like a breakthrough, occurs “away from the table” as the professional neutral meets privately with one or more parties to sound out their willingness to accept an emerging package or to find out what it will actually take to win their support. Mediation includes everything described under facilitation plus all the away from the table activities required at each stage of the consensus-building process. Table 13.1 summarizes these tasks.

## 4.7 Who Can Mediate Public Disputes?

There is some disagreement about the need to involve professionally trained mediators in public dispute resolution efforts. Indeed, some public officials argue that they are in a better position to manage the dispute resolution process—in part

Table 13.1 Tasks of the mediator

Phases	Tasks
<b>Prerenegotiation</b>	
<b>Getting started</b>	Meeting with potential stakeholders to assess their interests and describe the consensus-building process; handling logistics and convening initial meetings; assisting groups in initial calculation of BATNAs
<b>Representation</b>	Caucusing with stakeholders to help choose spokespeople or team leaders; working with initial stakeholders to identify missing groups or strategies for representing diffuse interests
<b>Drafting protocols and agenda setting</b>	Preparing draft protocols based on past experience and the concerns of the parties; managing the process of agenda setting
<b>Joint fact finding</b>	Helping to draft fact-finding protocols; identifying technical consultants or advisers to the group; raising and administering the funds in a resource pool; serving as a repository for confidential or proprietary information
<b>Negotiation</b>	
<b>Inventing options</b>	Managing the brainstorming process; suggesting potential options for the group to consider; coordinating subcommittees to draft options
<b>Packaging</b>	Caucusing privately with each group to identify and test possible trades; suggesting possible packages for the group to consider
<b>Written agreement</b>	Working with a subcommittee to produce a draft agreement; managing a single-text procedure; preparing a preliminary draft of a single text
<b>Binding the parties</b>	Serving as the holder of the board; approaching outsiders on behalf of the group; helping to invent new ways to bind the parties to their commitments
<b>Ratification</b>	Helping the participants "sell" the agreement to their constituents; ensuring that all representatives have been in touch with their constituents
<b>Postnegotiation</b>	
<b>Linking informal agreements and formal decision making</b>	Working with the parties to invent linkages; approaching elected or appointed officials on behalf of the group; identifying the legal constraints on implementation
<b>Monitoring</b>	Serving as the monitor of implementation; convening a monitoring group
<b>Renegotiation</b>	Reassembling the participants if subsequent disagreements emerge; helping to remind the group of its earlier intentions

Source: Susskind and Cruikshank 1987.

because they are accountable to the public and must stand for election (or, if they are an appointed official, work for someone who does). There are others who believe that only former officials (i.e. those who have retired from the public or the private sector) have the clout or standing necessary to pressure unreasonable parties to work out an agreement. The evidence available thus far, however, suggests that professionally trained mediators are usually quite effective (Susskind, Amundsen, and Matsuura 1999). Many of the most experienced public dispute mediators come from a background in planning, public management, or law (Sadigh and Chapman 2000).

## 5. ORGANIZATIONAL LEARNING

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One of the striking results of recent efforts to document the successful application of consensus building in the public arena is how few public agencies and units of government, even those with positive experiences to date, have tried to institutionalize mediation or other forms of conflict management into their normal operations (Dukes 1996). Almost two dozen US states have created offices of dispute resolution of various kinds—some in the executive branch, some in the legislative branch, and some in the judicial branch. Yet, most of these offices continue to operate on an experimental basis and have been asked to help with relatively few public policy controversies (Susskind 1986). Only three or four states have amended their zoning enabling acts to encourage consensus building. State and local agencies that confront constant challenges to their facility siting efforts have used consensus building on occasion (some with great success), yet few states have taken steps to shift as a matter of course to collaborative approaches. At the federal level, the results are a bit more impressive. The Administrative Dispute Resolution Act of 1996 requires federal agencies to use more consensus-oriented approaches to meeting their statutory mandates and to use these methods whenever possible.

### 5.1 The Barriers to Organizational Learning

There are a variety of forces working against the move to consensus building in the public policy arena. First, there is a substantial lack of knowledge about these relatively new techniques for getting agreement on public policy matters. A great deal of misinformation has been spread by advocacy groups who mistakenly believe that ad hoc, non-accountable representatives, working behind closed doors, will be given undue power (while key advocates are excluded) if consensus building is allowed. They fail to understand that consensus building guarantees that all relevant stakeholder groups must be given a place at the table and that in terms of both

process and outcome, consensus-building efforts must be conducted in the “sunshine.” Finally, the product of every ad hoc consensus-building effort must be acted upon by duly elected or appointed officials.

A second obstacle is the unwillingness on the part of elected and appointed officials to give up any measure of control. They rightly see consensus building as an effort to open up the operation of government to closer public scrutiny and more direct involvement of civil society. They know that the presence of a professional neutral, committed to a code of ethics and to non-partisan intervention, means that policy choices will have to be justified in a way that satisfies the interests of the community at large. The usual exercise of power will have to be accompanied by an explicit statement of the reasons why one package of policies or proposals was selected.

Finally, there is no entity responsible for trying to improve the quality of problem solving or group decision making in the public arena. Thus, there is no locus of public learning where the results of a shift to consensus building can be weighed and reviewed.

## 5.2 Dispute Systems Design

In the same way that total quality management (TQM) moved slowly from the private to the public sector, even though the results (in terms of consumer satisfaction) more than justified such a shift, consensus building has been slow to take hold in the public arena. Only a larger-scale, systemic assessment of the gains and losses associated with such a shift will provide sufficiently convincing evidence to allow those who see the benefits to make their case successfully. What needs to be done is to assess the advantages and disadvantages of a consensus-building approach at the systems design level. So, for example, when a stream of similar disputes (in the same locale) is handled in a new way there is a basis for comparison. In Canada, for instance, the Alberta Environmental Appeals Board, which hears hundreds of challenges each year to environmental enforcement efforts undertaken by the Provincial level agency, shifted to a mediated approach (when the litigants were willing). The results suggest that the overall effectiveness and responsiveness of the Appeals Board were improved markedly (Taylor et al. 1999).

## 5.3 Overcoming the Barriers to Organizational Capacity-building

There are a number of strategies that have been used to overcome some of the organizational barriers described above. Training agency personnel so that they are not fearful about more direct involvement of stakeholder representatives in

collaborative decision making is an important first step. Senior staff need to set internal policies so that agencies are willing to participate in consensus building, and operational staff need to learn how to function effectively in a mutual gains negotiation. Training also needs to be made available to the full range of stakeholder groups. If they feel they are at a disadvantage because an unfamiliar process has been selected, they will resist. A wide array of public agencies are sponsoring training for non-governmental, business, and other organizations.

Some agencies, such as the US Environmental Protection Agency, have set aside funds to cover the costs of consensus-building experiments. Without additional funds, staff will be disinclined to use existing program money to explore new ways of managing disputes surrounding the drafting of technical regulations. Once funds were set aside that could only be used for negotiated approaches to drafting regulations, internal advocates for such innovative efforts emerged. When word got out within the agency that negotiated rule making not only took less time and cost less money than traditional approaches to rule making, there was a greater willingness (although no great rush) to adopt such a consensus-oriented approach (Freeman 1997). The availability of discretionary grants also attracted the attention of non-government groups that saw an opportunity to generate subsidies for their involvement in rule-making processes that usually offer no support to non-governmental actors.

A third approach to promoting consensus-oriented approaches to public dispute resolution involves establishing a clear locus of responsibility for improving the quality of dispute handling. Federal legislation requires every agency to name a dispute resolution coordinator to look for opportunities to use consensus building in ways that will enhance the efficiency and effectiveness of government (Negotiated Rulemaking Act 1996). Once someone has this responsibility, it is not surprising that opportunities emerge. A number of states have something similar: naming an existing agency or creating a new agency to advocate consensus building. These agencies not only measure their success by the level of use of these new techniques, but they are also available to explain to others who may have reservations why consensus building is appropriate.

A fourth strategy depends on pre-qualifying a roster of approved neutrals. The US Environmental Protection Agency in conjunction with the US Institute for Environmental Conflict Resolution (USIECR) has established a computer-based list of carefully reviewed service providers. By maintaining this list (in an easily computer-accessible form) they have made it easier for stakeholder groups to participate in reviewing and selecting qualified neutrals. By standardizing payment rates for equivalently experienced mediators, the USIECR has eliminated many of the questions that often impede collaborative efforts to employ neutrals.<sup>2</sup>

It is easy for groups of all kinds to find reasons not to support consensus-oriented approaches to resolving public disputes when they are used to hard bargaining or feel qualified only to participate in traditional approaches to dialogue. It will take some time for democratic institutions to extend a full-fledged commitment to consensus-oriented approaches to resolving public disputes.



## 6. CONCLUSIONS

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1. Persuasion and hard bargaining do not produce results that are as fair, as efficient, as stable, or as wise as the public often desires when public policy choices must be made. Consensus building or the mutual gains approach to negotiation (as a supplement to, not a replacement for direct democracy) offers some hope of doing better.
2. Dialog can improve understanding if that is the goal, but dialog alone won't produce agreements, especially when values and not just interests are at stake.
3. Hard bargaining will continue to be used in a great many public policy-making situations, in many parts of the world, but the use of this approach ultimately makes it harder to implement agreements (because less powerful parties will feel that they have been unfairly overpowered and seek revenge), undermines trust in government, and often generates suboptimal (i.e. wasteful) agreements.
4. Consensus building puts a premium on mutual gains negotiation and creates a new, important role for an emerging player—the professional neutral (who knows how to use facilitation and mediation techniques)—to generate agreements that meet the interests of all the stakeholders involved.
5. The obstacles to institutionalizing consensus-building techniques in the public policy-making arena are imposing. It is difficult to overcome the resistance of public officials who mistakenly believe that ad hoc consensus-building efforts are a substitute for the legitimate exercise of government or that professional neutrals are a threat to their authority.
6. More participatory and more collaborative approaches to public policy making, built around the mutual gains model of negotiation, can enhance the legitimacy of government and reduce the long-term costs of collective action.

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