on even one promise is likely to lose leverage later on. Learn to disagree without being disagreeable. The other participants will be more likely to listen to what you have to say. Be prepared for each meeting. The negotiator who is not ready to report on his or her group’s reaction to the last round of proposals will lose opportunities to shape the course of the negotiations.

Remember that in times of difficulty, the mediator is there to assist you. Use the neutral to underscore your concerns. If for strategic reasons you feel uncomfortable publicly enunciating a change in your group’s negotiating stance, let the mediator relay this information to the other parties in private caucuses. If you feel that your interests are not being served, let the mediator announce this to the group as his or her observation.

Finally, regularly reexamine your coalition to see if it can be strengthened. David versus Goliath may be an unfair match; but thousands of Davids, acting in concert, may persuade Goliath to revise his estimate of his own power. The power of coalitions is enormous—provided, of course, that the members of the coalition share a commitment to the same outcome. Remember that coalitions may ebb and flow during a negotiation. You must constantly check to be certain that your coalition is holding together.

In summary, never think of your group as being powerless or alone. Even in isolation, you have considerable power. Your opponents have, after all, agreed to sit down and negotiate with you. Moreover, you may find other stakeholding groups with which to ally. You need not accept suggestions that you are underorganized simply because you are not formally incorporated, because you lack a legal department, or whatever. You and your neighbors will probably be around long after your opponents, whether they are governments or businesses, have changed leadership. You have a permanent stake in most distributional disputes, and you ought to be prepared to defend that stake. Continue to pursue all possible avenues to improve your BATNA, and to raise doubts in your adversaries’ minds about
their BATNAs. Conduct yourself in a manner that enhances your clout. If you are not certain which behavior will enhance your bargaining power, put yourself in the other person’s shoes. Which behavior would convince you that the other person had power?

BUSINESS INTERESTS:
ANALYSIS, STRATEGY, AND CONCERNS

Like the public official and the citizen, the representative of business interests must first determine whether certain general prerequisites can be met before he or she should enter a consensus-building process. Will the right people be at the table? Will they be able to negotiate effectively? Can they avoid the traps that tend to sabotage consensus? (See the discussion of “prerequisites” earlier in this chapter.)

If you as a businessperson or head of an institution are involved in a public dispute, there is a reasonable chance you have provoked the conflict by proposing one sort of project or another. Citizens’ groups are most often reactive, and public officials may lay out plans for things they would like to see done, but it is most often the business community that decides to take the risks involved in actually making things happen. Thus, you are likely to be on the defensive during the prenegotiation phase of most public dispute resolution efforts. You are also an easy target.

ANALYSIS

In addition to understanding the general prerequisites for a successful dispute resolution effort, the representatives of business interests must consider some additional prerequisites. Once
again, we will present these as questions. If you, as a business representative cannot answer these questions in the affirmative, then you probably want to steer clear of consensus-building efforts.

_Do you have the mandate to proceed?_ If your corporate structure is like most others, it is explicitly hierarchical. Therefore, you have to ask yourself whether you have the necessary mandate to enter into a consensus-building effort. If not, can you secure it by going to someone higher up the line? If you cannot get sufficient backing, do not start the conversation. If your hand is forced, and you must admit that you are not in a position to make the requisite commitments, the other participants will assume that your organization never intended to negotiate seriously. Under these circumstances, the chances for an amicable settlement will be greatly reduced.

_Is there someone with relevant negotiating experience who can represent your organization?_ The businessperson who approaches a public dispute resolution effort as if it were a business transaction is in for a rude awakening. The businessperson regularly engaged in buying and selling may think he or she is on familiar territory. There are many similarities between consensus building and the processes that lead to satisfactory agreements in the business world. Most important is the emphasis, in both the public and private sectors, on satisfying informed self-interest. On the other hand, there is a significant difference between striking a business deal and settling a contentious distributional dispute.

On almost every score, the management of private business transactions is simpler than negotiations in the world of public disputes. Consider some of the steps in consensus building as they apply in the private sector:

_Getting started_ is generally not a problem. Business transactions are, for the most part, unassisted. One side expresses interest in buying or selling, and potential partners respond.
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While no one wants to look too eager, an indication of a willingness to negotiate is not seen as a sign of weakness. **Representation** presents no great challenge. Buyers and sellers represent themselves or appoint hired spokespeople. Each interaction usually begins with two parties—a buyer and a seller (although others may be added).

**Agenda setting** is perfunctory. Both sides approach the bargaining table with roughly the same agenda (“I want to sell it; you want to buy it”). There may be some incentive to link future deals, but such considerations remain secondary to the sale at hand. Bargaining protocols are tacitly understood and accepted.

**Joint fact finding** is negligible in a business transaction. Most often, each side does its homework before arriving at the table. If not, neither worries too much if the other is operating on bad information or faulty assumptions. Indeed, the seller may well be tempted to “hype” the product or service. The buyer probably expects this. Each keeps as much information confidential as possible.

**Inventing and packaging options** is, of course, a key step in making both private and public deals. But as with joint fact finding, the effort to create and combine options is tightly circumscribed in a business transaction. Again, in the simplest terms, the buyer’s and seller’s options are self-evident. Almost everything is reduced to equivalent dollar value, although the items traded may in fact take many forms.

**Producing a written agreement** may be time-consuming in a complicated corporate transaction, but the ground rules are clear. The negotiators follow the outline of a standard legal document, and lawyers subsequently use the rough agreement to produce a contract acceptable to both sides. It is also legally enforceable (if either party defaults, they will be sued), which solves the otherwise difficult problem of binding the parties to their commitments.
Monitoring and renegotiation are generally not significant issues in private situations. In some cases, the parties may include an arbitration clause in their final business agreement. This minimizes the difficulty of handling subsequent disagreements. Such procedures are common practice and are rarely invented anew in a business negotiation.

It might be desirable for more business negotiators to think about alternatives to the conventional approach to making deals as described here. They might improve their negotiations by seeking to maximize joint gains, thereby leaving the parties in a better position to deal with each other in the future. In any case, it is clear that most business negotiators are experienced only in the give-and-take of positional bargaining. This puts a premium on certain strategic behavior, and ignores other considerations absolutely essential to the resolution of distributional disputes.

When your organization attempts to reach a negotiated settlement to a distributional dispute, therefore, you want to be represented by someone who has been involved in more than the simple buying and selling aspects of business. Your representative should be accustomed to dealing with the community and with political officials. Furthermore, he or she should be in close contact with the top echelons of corporate leadership.

Most large corporations, of course, recognize the need for effective community relations and have a department dedicated to that function—public affairs, external relations, or the like. But the individuals in those departments may not be your most effective negotiators. They may not, for instance, be familiar with the details of the project being proposed. Thus, it may be best to put together a negotiation team with the requisite skills and experience.

Can you be patient about deadlines? If you enter into assisted negotiations, you will find the going slow at the outset. In fact, you will be going very slowly, at least at first, and the process may seem hopeless—time-consuming, expensive, uncomfortable.
Taking Action

able, and unproductive. This is the period when the two previous prerequisites (a mandate and prior experience) are most important. People within your organization will almost certainly seize upon the apparent shortcomings of the negotiations as the process drags on.

On the other hand, by working toward a consensus, you are trying to reduce the overall time and expense that would otherwise be involved in litigation or extended political negotiation. Like the public official, you have to look at the alternatives over the life of the project and beyond, and determine which approach is likely to generate a solution that can be implemented most efficiently.

If you decide upon a consensual approach, you will need patience. If you decide to move forward without first building consensus, you may find yourself in court, or locked in political battles. This is especially important for businesspeople to remember, because your calculations of your interests are usually time-sensitive. Most profitable ventures become unprofitable if delayed long enough. Paradoxically, it sometimes makes sense to “go slow to go fast.”

Business interests have only three options when projects they propose turn out to be controversial. They can abandon them, attempt to implement them unilaterally and hope for the best, or enter into a consensus-building effort. The first course of action is “efficient,” but produces nothing. The second may seem efficient and productive, but if it goes awry it may only generate years of controversy and legal wrangling. The third alternative—consensus building—initially seems inefficient and unproductive, but it may well present the best chance of generating a workable solution.

In summary, if you are not prepared to start slowly, do not start at all.

Do you intend to continue doing business in the same community? We have already raised this issue in our discussion of citizen group strategy. Some business organizations care a great
deal about being perceived as a "good neighbor"; others do not. This decision is usually made on the basis of the company’s sense of its likely future investment in the community. If your firm intends to work again in the region in which a particular dispute has arisen, that consideration must be part of your analysis of your options. A successful dispute resolution effort may well create a positive climate for future initiatives. At the very least, consensus should enhance long-term working relationships with citizens and political officials.

STRATEGY

As noted earlier, business interests are very likely to be the "cause" of public disputes. In other words, in many cases, the initiative comes from you and others must react to it. If your analysis leads you to conclude that consensus is possible, you may want to be the one to initiate assisted negotiations. Please refer to the section on prenegotiation advice for public officials regarding the best way to find and use a convenor, to hire a mediator or facilitator, and so on.

During the prenegotiation phase, when agenda setting begins, be prepared for pressure to frame the agenda as broadly as possible. This is important. The businessperson usually does not realize how many issues have to be put on the table in order for effective and mutually satisfying trades to be possible. The following scenario, for example, is played out again and again in the public arena.

The developer approaches the community group at the beginning of a consensus-building effort and says, "Here's my development plan." The community responds by saying, "We don't like it." The developer points out that the proposal is based on a great deal of prior research and expert advice, meets the letter of the law, and will produce valuable public benefits. The community indicates that it will find ways to block the project.
“Well, what do you want?” the developer finally asks with some exasperation. “You know that park on the other side of town?” the community responds. “We’d like you to fix it up for us.” The developer is honestly astonished: “What? I can’t do something way over there, off the site of my project!”

Businesspeople are only slightly less inclined than government officials to bristle at the prospect of off-site trades and other “extraneous demands.” In some cases, public officials work under legal restrictions that preclude such linkages. But developers rarely do. You may find it useful, in fact, to think of this as a luxury. Because you are relatively unencumbered by such restrictions, you can afford to be very flexible with regard to the compensatory, in-kind, or mitigatory promises you make.

The dilemma for the business negotiator, of course, is how to avoid encouraging extortionate behavior. If the park across town is acceptable, why not day care for local children, a new roof for the public housing project, or anything anyone else wants? What is to stop the list from growing longer and longer?

The answer is to insist that each linked request meet the following three tests. First, anything that is requested must come from one of the participants in the negotiation, who must be prepared to make commensurate commitments in return. Second, the request must be accompanied by a convincing analysis of the cost or adverse impact that you are being asked to mitigate or compensate. (Would a noninvolved analyst confirm the reasonableness of the cost you are being asked to assume?) And, third, all the requests together must not exceed the value of the benefits of consensus (in other words, you must still do better than your BATNA). This means, by the way, that benefits to the community should be subtracted from the value of the adverse impacts to be compensated or mitigated.

The goal is not to encourage a wild trading spree. Rather, the intent should be to find a way to meet the underlying interests of each stakeholding group. The smart business negotiator lets
it be known that he or she is willing to be "convinced on the merits" that compensation or mitigation is appropriate, but at the same time insists upon the three conditions listed here.

In any negotiating situation, the parties ought to prefer adversaries who are well prepared (that is, who know their BAT-NAs, are in close touch with their constituents, and understand the technical issues involved). Because most distributional disputes hinge, in part, on expert knowledge, it is important to verify that the public officials and citizens with whom you are dealing have access to the technical advice they need. In the example just cited, for instance, architects and engineers might be needed to determine whether a proposed development is technically feasible. A lawyer might be required to investigate pertinent zoning or deed restrictions, and what is legally allowed; and a financial expert might be called in to assess the economic feasibility of proposed alternatives.

You, as the developer, have a professional background in the field. You also have the financial resources to employ whatever consultants you need. The nearby residents have neither of these advantages and therefore cannot participate effectively—without help—in the negotiations. The presence of your lawyer, architect, or engineer will underscore this asymmetry in their eyes. What is the solution?

We argue that it is your responsibility to correct this imbalance of power. The other group or groups need to be given the resources to develop their technical expertise. Without such assistance, they will be unable to make informed judgments, and will therefore be reluctant to accept anything you say as an accurate portrayal of the situation.

It might seem unwise—or even suicidal!—to give aid and comfort to one's adversary in the context of a business transaction. Our experience suggests that in the long run of a distributional dispute, it is cheaper and more effective to do just that. Two points must be kept in mind. First, perceptions are as important as facts. Second, it is exactly the psychology of "ad-
versaries” that you and your negotiating partners need to overcome, particularly if you are trying to build consensus. You will find it exceedingly difficult to operate in an atmosphere of distrust and hostility.

As the technological complexity of a dispute increases, the likelihood that such suspicion and hostility will interfere with the consensus-building process also increases. Thus, the more technically complex the dispute, the more assistance the business community may have to provide in order to ensure that its negotiating partners can deal wisely with all the issues.

Of course, financial assistance should not just be handed over. The plans for the use of the funds donated to a resource pool should be subject to the joint approval of all the participants. Funds should be used for fact finding, not for the purchase of “hired guns” to engage in a “battle of the print-out.” Finally, funds should probably be contributed in installments as the consensus-building process passes certain milestones (although the initial promise of funds should be for the whole amount).

Offering to share your technical support staff, by the way, is an unsatisfactory alternative. Unless neutral experts, selected jointly by all parties, are used, technical findings are likely to be less than credible in the eyes of some of the participants.

Insist on a written agreement even if it memorializes an informal settlement that must still be incorporated into a formal decision process, prior to implementation. Also, insist on the creation of satisfactory enforcement mechanisms that will hold citizens and public officials to their promises. In some ways, yours is the most “responsible” organization at the table—public officials may be turned out of office; citizen groups may experience turnover in their membership or splinter into smaller factions. If you invest months of time and substantial amounts of money, you have every right to expect compliance with the agreement.

This means, in turn, that you have a right and a responsibility to be involved in the process of converting the informal agree-
ment to a formal one. Work hard on that issue, and be prepared to consider some unusual proposals suggesting how your company can be bound to an agreement. Keep in mind that just as you may continue to have suspicions about the other group (“They may splinter or disappear”), that group may well retain its suspicions about you (“Once the bulldozers go in, we’ll have no more influence over this process”). The conversion from an informal to a formal agreement is a vital step in allaying these concerns. Hammer away on the theme that this is a shared priority: Everybody in the process wants to make sure that the agreement they have worked so hard on is codified.

CONCERNS

Most of the basic concerns of business interests have been suggested in the previous two sections. Before assisted negotiations begin, and even after they are under way, voices within the company are likely to raise fundamental objections to the process. “This is only going to make everything ten times harder,” they will say. “Why don’t we just make a deal with the mayor, behind closed doors, and let him sell it to the community?”

The answer, as emphasized in the early chapters of this book, is simple. You are less and less likely to get away with it. The political and business climates in America have changed, and will continue to change. The direction of all that change is away from deal making behind closed doors. Increasingly, private deals will tend to embarrass your company (and also the public officials involved) at some later point. Public negotiations are, indeed, big, messy, and time-consuming, but it is not clear that you have any real alternative, especially in the case of large-scale projects.

A second concern of the business interest representative is, “Can I trust these people? In the past, they haven’t given me much reason to think so. I’m good for my word, but what about
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them?” The appropriate response to this concern was introduced earlier. Trust has very little to do with it. If you are negotiating with people you do not trust, keep insisting that they be explicit about how any proposed agreement can be ratified and enforced.

Finally, we raise an issue that should be a concern more often than it is. Can you get your organization to take this process seriously? Many businesspeople, unfortunately, look at the consensus-building alternative and say, “Well, we’ll do it for public-relations reasons—but only if it doesn’t take a lot of time and money. We’re certainly not going to count on public negotiations to produce anything workable.” The pitfall is obvious. With this attitude, your organization will only participate halfheartedly. A lack of commitment on your part will soon be obvious to the others, and may well scuttle the entire effort.

ADVANCES IN DISPUTE RESOLUTION

The aftermaths of the events that inspired the cases presented in this book are instructive. The Academy of Sciences in Metropolis informally spread the word about the session they organized to address the dioxin dispute. Other scientific groups soon volunteered to host similar sessions in their communities. Now, whenever the dioxin issue emerges—as it does regularly—so too does the notion of bringing the disputants together to work out a way of proceeding.

Judge Rollenkamp was pleased with the results of the mediation effort in the Harmon County sewage dispute. He subsequently discussed the process with numerous judges not only in his own state, but in other parts of the country as well. Since the Harmon County dispute was settled, more than a dozen
other judges in several states have begun exploring the merits of using court-appointed special masters as mediators. As a result of the Chippewa fishing rights dispute, Judge Eastman, too, has become a strong advocate of mediated approaches to resolving complex cases.

RiverEnd was one of the earliest environmental dispute resolution efforts in the eastern United States. In the relatively few years since that negotiation was concluded, dozens of similar cases have been facilitated or mediated successfully. A report analyzing more than a hundred such efforts was published in 1985 by the prestigious Conservation Foundation in Washington, D.C.

In explaining assisted negotiation, we imagined that the reader would be responsible for organizing a consensus-building process from scratch. We took this approach to show that there is nothing arcane or mysterious about the concept. In theory, having read and understood this book, you are now equipped to proceed.

Throughout this book, we have stressed the importance of putting yourself in the other person's shoes. Now, we will try to put ourselves in your place. Perhaps you are a regional transportation official, responsible for extending a rapid transit line into a suburban area that does not want the subway. Perhaps you are the head of an ad hoc citizens' group, organized to block the siting of a regional power plant or a halfway house. Or perhaps you are a developer trying to deal fairly with the environmentalists and historic preservationists who oppose your project. With this slim volume in hand, are you confident that you can generate consensus? Probably not.

Aside from the seeming intractability of the issues at hand, you may also be raising an obvious question. If these methods are so effective, why aren't they used routinely? The answer is that they are, in some cases. We can cite numerous instances at the local, state, and national level in which a consensus-building approach has been adopted, tested, and proven useful. More-
over, we can point to circumstances in which officials are now attempting to go beyond experimentation, to incorporate these processes into the everyday workings of government.

The following examples illustrate that individuals or groups using assisted negotiation are not indulging in wishful thinking. Since the mid-1970s, responsible leaders in the public and private sectors have been trying to find ways of using consensus building to supplement our legislative, administrative, and judicial processes.

AT THE LOCAL LEVEL

Many municipally supported dispute resolution programs have been created as alternatives to court. These have been established to help people work out their differences more rapidly, at lower cost, and without the trauma often associated with the judicial process. Most of these programs deal primarily with private disputes between neighbors, family members, and buyers and sellers. A few, however, offer assistance in distribu-
tional disputes. It is important to keep the distinction between the two types of local dispute resolution programs clear. For simplicity's sake, let us label court-connected programs that handle private disputes "alternative dispute resolution (ADR) centers." We will call free-standing centers that handle public disagreements "public dispute centers."

The ADR centers are the subject of substantial controversy. Critics have charged that such alternatives to the court system offer little more than "second-class justice." We disagree; moreover, this charge has not been leveled at public dispute centers.

There are now free-standing public dispute centers in various parts of the country. They are supported either by foundation grants or by fee-for-service contracts. The Mediation Institute in Seattle (with offices in Washington, D.C., Wisconsin, and California) was one of the first free-standing centers to offer dispute resolution services. The institute has been quite success-
ful in helping to resolve environmental disputes. Similarly, the New England Environmental Mediation Center (with offices in Massachusetts, Connecticut, and Vermont) has played a key role in resolving various land use and environmental disputes throughout New England. In Virginia, the Institute for Environmental Mediation (based at the University of Virginia) has successfully mediated several site-specific disputes and helped resolve a number of regional and state-level policy disputes. The institute in Virginia has been supported primarily by foundation grants.

In New Mexico, the Western Network has provided mediation assistance in disputes over the allocation of water and land resources. In the Denver area, ACCORD Associates (formerly the Rocky Mountain Center on the Environment) and the Center for Dispute Resolution have played important roles in settling a wide range of distributional disputes, and have provided assistance in some significant policy negotiations, including the Denver Water Roundtable. The Forum on Community and Environment has taken a similar role in the San Francisco Bay Area.

Many of these centers were started with foundation grants and in subsequent years have been able to generate fee-for-service work as well as regular contributions from local supporters. They have worked hard to ensure balanced funding, with the goal of maintaining their independence. This is important: Centers that accept primarily industry support or government support may jeopardize their credibility as nonpartisan organizations.

For-profit centers (such as Interaction Associates in San Francisco, Boston, and Washington, D.C., and Endispute in Washington, D.C., Chicago, and Boston) have also been active as facilitators in a variety of public disputes, while simultaneously offering dispute resolution services to major corporations dealing with internal conflicts. Major organizations such as the Conservation Foundation (a nonprofit Washington-based re-
search and policy center) and the Colorado-based Keystone Center have created highly regarded dispute resolution offices within their organizations. Consulting firms such as Boston’s ERM-McGlennon offer public dispute resolution services, as well as other management and engineering consulting assistance.

The Neighborhood Boards Program in San Francisco is an interesting hybrid of an ADR center and a public dispute center. It draws on existing community groups and offers neighborhood board members training in both private dispute resolution and settling distributional disputes at a neighborhood level. Boards such as these can serve as convenors in public disputes—or even as mediators, if all the parties are willing. In Honolulu, for example, elected neighborhood boards have played intermediary roles in local disputes.

Another exception to our distinction between the two types of centers is also in Honolulu: the Neighborhood Justice Center. It was established as a court-connected “alternative to court” for handling disputes between private parties; over the years, though, the center has also been quite active and quite successful in providing mediation services in local land use disputes.

The techniques described in this book have proven effective in a wide variety of settings. Each of the more than fifty centers and organizations currently in operation has learned by trial and error that intervening in distributional disputes requires specialized knowledge of both the context and the conflict. One of the reasons that these centers have sprung up in every region of the country is that local connections are crucial for would-be intermediaries.

Some other preliminary efforts are under way which may lead to the institutionalization (or adoption by government) of assisted negotiation in ongoing municipal decision making. Many zoning appeals, for example, may soon be mediated routinely, because current pilot projects indicate that disputing parties tend to reach voluntary accords that are generally acceptable to
zoning appeals boards. Other local administrative processes, involving the granting of permits, the siting of municipal facilities, the setting of budget priorities, and the formulation of growth management plans, may soon be mediated as a matter of course, before formal bodies are asked to make a judgment.

AT THE STATE LEVEL

Five states—Hawaii, New Jersey, Massachusetts, Minnesota, and Wisconsin—have created state offices to mediate distributional disputes. With grants from the National Institute of Dispute Resolution in Washington, D.C., these offices are probably the most significant step thus far in the institutionalization of public dispute resolution. The primary role of these state offices is to match the parties in distributional disputes with appropriate intermediaries. In some instances, they also pay facilitators and mediators, usually when a dispute is of statewide significance. The state offices are playing an important role in educating decision makers, both inside and outside government, about the advantages of consensual approaches to resolving distributional disputes.

The existence of state offices of mediation will help to overcome some of the chief obstacles to more widespread use of assisted negotiation. One advantage is in timeliness: These organizations can appear on the scene when a dispute is just beginning to smolder, and use the good offices of the governor or the state judiciary to bring the parties together. Moreover, they can foot the up-front costs of the prenegotiation phase, giving the parties time to see just how assisted negotiation works. They can also serve a screening function, maintaining a list of qualified intermediaries; in certain circumstances, they can manage resource pools, and serve as a conduit for paying mediator salaries out of funds contributed by the participants. Finally, they will undoubtedly play an important role in ensur-
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ing that careful evaluation and learning go on as case-by-case experience accumulates.

Even before the first state offices of mediation were created, a number of states had taken steps to employ assisted negotiation as a supplement to various administrative processes. Massachusetts, Wisconsin, and Rhode Island, for example, have adopted hazardous waste facility siting laws that presume mediation will precede formal siting decisions.\(^\text{13}\) These laws are important for several reasons. First, they remove the obstacles to initiating consensus building. Second, they clarify what the protocols will be. Third, they make it easier to understand exactly how informally negotiated agreements can be formalized. The Massachusetts Siting Law, for example, spells out the steps involved in formalizing a negotiated agreement, and gives such agreements the force of law.

Other state efforts, some still embryonic, are quite encouraging. Several states have employed negotiated approaches to set electric utility rates.\(^\text{14}\) Instead of relying on the typical adversarial model of rate setting (which pits utility companies against consumer advocates, with the rate commission as the final arbiter), these states have tried to bring together all the interested parties with a mediator to work out equitable rate increases. New York State is furthest along in its efforts to mediate utility rate disputes.

As was illustrated in the social service block grant case, states can use assisted negotiation to hammer out agreements on how to allocate their human service funds. This has happened recently in Connecticut, for example. Groups that were formerly adversaries (including providers of human services, state agency administrators, consumer and municipal representatives) were able to reach consensus on spending cuts and increases.\(^\text{15}\)

It is clear that the states have taken the lead in developing consensual approaches to resolving distributional disputes. We can perceive an impending problem in the states’ activities,
however. Unless state laws explicitly authorize intermediaries to function in distributional disputes at both the state and local level, confusion and opposition is likely to arise whenever such approaches are proposed. In short, legislative action is needed to enable the widespread institutionalization of consensus building.

AT THE FEDERAL LEVEL

A number of interesting uses of consensus building have received attention at the federal level, particularly efforts to mediate the drafting of new regulations. The EPA, as well as the Federal Aviation Administration and the Occupational Safety and Health Administration, have been successful in bringing together the parties most likely to challenge proposed agency regulations, in order to draft consensual versions of the rules.

In the EPA’s case, the agency has, on at least five occasions, sat at the table with more than twenty representatives of national environmental organizations and interest groups. In the first case, the goal was to draft new regulations regarding financial penalties for truck engine manufacturers slow to meet the Clean Air Act’s guidelines. In the second, the EPA sought to draft rules regarding the emergency circumstances under which certain new pesticides might be exempted from usual licensing procedures. Professional facilitators and mediators played a key role in the success of each of these efforts. The outcome in both cases was a set of proposed rules, which then went through the normal review and comment processes to guarantee that no parties who should have been involved had been overlooked. As it turned out, surprisingly few comments were received, and the draft rules were adopted without opposition. Given that in this period—1984—the EPA was defending in the courts almost 80 percent of the rules and regulations it proposed, these successes were quite noteworthy.

The EPA has also expressed serious interest in finding ways
to encourage negotiated settlements of Superfund cases. Clean Sites, Inc., a nonprofit organization established jointly by the major chemical companies and environmental organizations, is now involved as an intermediary at a number of sites. The creation of this sort of mediating institution is a precedent that may well inspire combatants in other public policy realms to form similar organizations.  

Not only is the EPA moving ahead with additional negotiated rule makings, but other agencies (including the Department of the Interior, the FTC and the Nuclear Regulatory Commission) have decided to mount similar efforts of their own. Over time, negotiated rule making may become the norm at the federal level, at least in instances when controversial rules are being promulgated.

Other federal agencies have explored additional uses of consensual approaches to resolving distributional disputes. Long-controversial questions are being reconsidered in light of these new tools. Which federal lands, for example, should be set aside as “forever wild”? Which parts of the continental shelf should be put out to bid for off-shore oil exploration? What new rules should govern the use of the national park system? The Corps of Engineers and the Department of the Interior—often lightning rods of environmentalists’ discontent—are increasingly willing to try a consensus-building approach.

The federal courts may also provide an added impetus for the future institutionalization of consensus building. The success of the fishing rights mediation effort described in this book has encouraged federal courts to consider using mediation and non-binding arbitration in other complex distributional disputes—ones which the courts would prefer to have the parties settle on their own. The use of court-appointed special masters as mediators may also make it easier to get negotiations started, and help address the inability of certain parties to put up an equal share of the funds for a resource pool. In such cases, the court pays the mediator.
In conclusion, it may be useful to address what may seem to some to be a paradox: the institutionalization of ad hoc approaches to dispute resolution. After all, one might argue, the supreme virtue of an ad hoc approach is that it can be shaped to fit a given occasion. Will institutionalization cause the same kind of rigidity that led to the need for ad hoc approaches in the first place? We think not—as long as institutionalization means the creation of enabling statutes, funding arrangements, and procedural suggestions intended to encourage, rather than circumscribe, the case-by-case use of assisted negotiation.

SUMMARY

Consensual approaches to resolving distributional disputes are no longer new. On the other hand, neither are they so well understood that they have been generally adopted. Indeed, as we have stressed in earlier chapters, our various legislatures, agencies, and courts are in trouble today precisely because they have continued to use conventional dispute resolution mechanisms in situations where they are not appropriate.

As the merits of assisted negotiation become clearer, more and more attempts will be made to institutionalize these processes as supplements to existing mechanisms for resolving distributional disputes. At that point, the challenge will be to match each dispute with the most appropriate form of consensus building.

One way of thinking about the types of consensus building most appropriate to the types of disputes discussed in this book is outlined in figure 6.1. The vertical columns represent the three branches of government—legislative, executive, and judicial—and the horizontal rows represent the three levels of government: local, state, and federal. (For simplicity’s sake, we have
FIGURE 6.1

Using Mediation and Other Forms of Assisted Negotiation

<table>
<thead>
<tr>
<th>Legislative</th>
<th>Executive</th>
<th>Judicial</th>
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<td>JORDAN LANE</td>
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<tr>
<td>State</td>
<td>Coastal zone</td>
<td>RIVEREND</td>
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<td>management</td>
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<td>Federal</td>
<td>EPA-NEGOTIATED</td>
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omitted other levels, such as county government.) In all but one of the cells of this figure, we have cited a successful consensus-building effort. Those discussed previously are listed in capital letters; two additional cases are described briefly in the following paragraphs.

At the local level, the Navy Yard dioxin case indicates that a city council can use facilitation or mediation before it exercises its statutory authority. Similarly, the administrative agencies of local government can use facilitation or mediation to supplement their normal ways of handling licensing, permitting, and related efforts to enforce regulations. The zoning appeals board in Bexley was prepared to live with a negotiated agreement in the Jordan Lane case. In a great many other cities, site-specific development disputes have similarly been mediated and have yielded agreements that are being implemented through normal administrative processes.

"Housing Court Mediation" is the local/judicial cell in figure 6.1. In several cities, including Boston and New York, housing
courts—accustomed to being burdened with hundreds of cases involving tenants and landlords—have sanctioned the use of mediation prior to scheduled trials. Although most of these are private disputes (and therefore distinct from the kinds of distributional disputes we have been discussing), some of the mediated cases have also involved broader housing policy disputes.18

At the state level, RiverEnd represents one of the many instances in which state regulatory bodies have used facilitation to supplement their normal administrative procedures. State agencies, as in the block grant case, can use outside mediators to help generate consensus on budget proposals. Similarly, requests to increase electric utility rates can be mediated prior to review by public utility commissions. In some ways, such a mediation would resemble current administrative hearings that produce stipulated agreements prior to board review. A key difference, though, is that the current adversarial hearings process could be replaced by joint problem solving.

Judge Rollenkamp was neither the first nor the last state judge to use a special master as a mediator to help settle a dispute pending before a court. State courts have expressed growing interest in the use of mediation and nonbinding arbitration, and their work with the new state offices of mediation is ample evidence of this.

Referring again to figure 6.1, “Coastal zone management legislation” is given as an example of a state level legislative effort. In Massachusetts, when new legislation was needed to respond to court-imposed requirements regarding the disposition of tidelands (the land between the high-water and low-water marks), a facilitated effort produced draft legislation that broke a serious deadlock, and produced agreement in a matter of weeks.19

The EPA has used both inside and outside facilitators to mediate rule-making negotiations. The convening process has been handled exclusively by outsiders. Other federal agencies
including the Forest Service and the Department of Defense have used facilitated approaches to supplement normal grant-making procedures. Judge Eastman’s use of mediated negotiation to settle the fishing rights case is just one of many instances in which federal district courts have used mediated negotiation to settle complex litigation. Several courts have also used non-binding arbitration, including minitrials, to settle disputes involving thousands of litigants (such as the suits pending against the asbestos industry). And although Congress has yet to organize facilitated or mediated sessions to build consensus on policy questions, we expect that such efforts are not far off. In a sense, precedents already exist. Congress would only have to extend the bipartisan consensus-building efforts used to secure agreement on social security reform in the early 1980s—that is, to include other noncongressional representatives of relevant stakeholding groups in drafting legislative proposals—in order to engage in true consensus building.

There have even been successful intergovernmental mediation efforts. The Kettering Foundation, of Dayton, Ohio, has sponsored what they have called Negotiated Investment Strategy (NIS) dispute resolutions in several cities, including Columbus, Ohio; Gary, Indiana; and St. Paul, Minnesota. These involved bringing together three teams—one representing local elected officials, another representing state elected and appointed officials, and a third representing the federal agencies with a stake in the long-term development of the cities involved. With the help of professional mediators, these teams were able to negotiate long-term public and private “investment strategies” that reconciled the conflicting priorities of the three levels of government. Given the recent emphasis on public-private partnerships, the Kettering Foundation’s efforts provide us with an important clue about how to proceed on this crucial front.

If the disputants in a conflict situation are willing to work creatively to exploit their differences, and can keep in mind their common interests, negotiated approaches to dispute resolution
can work. This means, though, that voluntary supplements to the conventional mechanisms used by our legislative, executive, and judicial branches must be devised. In particular, professional intermediaries—facilitators, mediators, and arbitrators—need to be included. And although numerous obstacles to consensus building exist (not the least of which is securing funding when disputing parties have an unequal ability to pay), these can be overcome. The cases presented in this book are only a small fraction of the evidence supporting this claim.
CHAPTER 7

Conclusion

As anyone who reads the daily papers knows, the complexity of public disputes can be daunting. Indeed, the pessimists among us have concluded that there is no choice but to "slug it out" in the political arena. We disagree. The strategies and techniques described in this book offer an alternative.

We have tried to show that it is possible to resolve public disputes fairly and efficiently, while incorporating the best technical and scientific advice available. Moreover, consensual outcomes arrived at in the fashion we have described are likely to be more stable than political compromises achieved through conventional means.
NEGOTIATED APPROACHES TO CONSENSUS BUILDING

The parties in public disputes can, and should, satisfy their own interests. No apologies are necessary for pursuing selfish rather than altruistic goals. On the other hand, when individuals or groups must depend on support from others before they can take the actions they want, they must satisfy the needs of those other parties to achieve their own goals. Interdependence requires helping others in order to help ourselves.

In almost every public dispute, the contending parties have mixed motives. In the Middletown dispute, cited in the introduction, the parties wanted to solve the problem of the homeless and to do it in a way that was consistent with their own interests. The parties involved in Middletown had competitive aims as well as cooperative impulses. Unfortunately, they failed to take full advantage of these “dual” concerns, and in the process they made it even more difficult to work together in the future. Furthermore, they made no effort to gather information jointly or to develop forecasts collaboratively. It is no surprise that they could not agree on the best way to approach the problem.

The Middletown disputants failed to engage in even the most minimal form of brainstorming. They locked themselves into proposed solutions before even hearing the views of others. As the dispute wore on, the participants lost sight of their common interest and gave up the search for all-gain solutions.

They never tried to develop an informal written agreement. No one was asked to check back with his or her constituents to determine what the population at large really wanted done.

Those with the statutory authority to commit public resources and set policy in Middletown maintained complete control. They sought very little guidance from groups that might have been able to give them helpful advice. When they did seek input from others, they relied on public hearings that quickly
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deteriorated into nothing more than an opportunity to grandstand for the media.

No joint monitoring process was established to keep track of what was working and what was not. No one accepted any responsibility for achieving specific objectives within a given time.

**UNASSISTED AND ASSISTED NEGOTIATION**

The disputants in Middletown thought they could work things out on their own. They would have been better off seeking outside assistance. By “assistance,” we mean some form of procedural help.

The Jordan Lane case suggests that unassisted negotiations can succeed only when certain conditions are met. The Middletown dispute involved too many complex issues for the parties to succeed on their own. In addition, the full range of stakeholders was not obvious; nor were all the key parties willing to engage in joint fact finding. Most important, each disputant’s alternative to no agreement was not unattractive enough to bring them to the bargaining table.

Unfortunately, most public disputes do not meet these preconditions for success in unassisted negotiation. Large numbers of hard-to-identify parties are likely to be involved. The issues are typically complicated and numerous. And some of the parties are likely to view the lack of an agreement as an acceptable outcome. The RiverEnd, Harmon County, fishing rights, and social service block grant disputes illustrate these points quite nicely. The parties in many-issue, multiparty public disputes need neutral consensus-building assistance.

In such cases, intermediaries should be selected to fit the
specifics of the dispute. The backgrounds, affiliations, and reputations of the neutrals must be examined carefully by all the parties.

We have identified three forms of procedural assistance that can be helpful: facilitation, mediation, and nonbinding arbitration. Each involves a different level of intervention, although all leave the disputants as much control as possible. All three might have been tried in the Middletown dispute. Facilitation and mediation were effective in the major cases we presented.

Assuming that a dispute proves too difficult for the parties to handle, they might begin by engaging a facilitator to help with a variety of prenegotiation tasks, including stakeholder analysis, the formulation of ground rules to guide the interaction, and agenda setting. The facilitator, as we saw in the RiverEnd case, can provide “at-the-table” guidance and logistical support (arranging the time and place of meeting, taking and distributing minutes, and so on). The facilitator should only serve as long as all the parties are satisfied with his or her performance and the progress they are making.

The services of a mediator are typically required when caucuses or confidential between-meeting interaction is necessary, as in the Harmon County case. It is not inappropriate to ask a mediator to propose mutually advantageous “packages” when the parties have run out of ideas. In addition, the mediator should be empowered to “shuttle” back and forth when communication has broken down. To be effective, mediators need substantial grounding in the substance of the dispute. While they must maintain their nonpartisan stance at all times, this does not mean that they can be indifferent to the outcome of the dispute. As was the case in the fishing rights dispute, in particular, it is appropriate for a mediator to worry about the fairness, efficiency, stability, and wisdom of any agreements reached. This does not entitle the intermediary to steer the negotiations toward a particular outcome, but it does mean that the participants should expect the neutral to press them in ways that focus
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attention on the attributes of a good outcome. In the end, however, the agreement must still be consensual and must be “owned” by the participants.

Disputants can turn over more control (but still not total control) to an arbitrator who offers an opinion on how they should resolve their differences, but does not bind them. This is the last stop before the parties cross over into nonconsensual dispute resolution. By asking a mutually agreed-upon “judge” or panel to indicate how a court or a jury might settle a dispute, the stakeholders can gauge their aspirations more realistically. This often leads to voluntary resolution of private disputes, especially if one party has been holding out unrealistically.

LIMITS ON CONSENSUAL APPROACHES TO DISPUTE RESOLUTION

Why are the techniques described in this book still underutilized?

The most important reason seems to be a concern on the part of public officials that participating in consensual negotiations may constitute an abdication of legal responsibility. Such assumptions are misplaced. In almost every situation we have observed, including all the cases presented in this book, consensual approaches fit quite well within the constraints imposed by the laws governing the actions of elected and appointed officials. As long as the consensus-building process is conducted openly and all interested parties are invited to participate, there is no reason to worry about abdication of responsibility. Moreover, if the product of such negotiations is an informal written agreement that must still be ratified, all due process and equal protection requirements can be met.

Some public officials presume that consensus building means
giving up power. This is not true. Because informally negotiated agreements must be formally ratified by those in positions of authority, the status quo with regard to decision making will not change. Moreover, consensus means that all key participants—including the elected and appointed officials involved—must agree that an agreement serves their interests. Thus, no official who initiates or agrees to participate in a consensus-building process is giving up his or her power to veto an outcome.

We believe that public officials can increase their power by encouraging consensual approaches to dispute resolution. This is true because the public favors fairer, wiser, more stable, and more efficient resolution of distributional disputes.

From citizens and public interest advocates, we often encounter concerns about entering negotiations when resources and political power are unequally distributed. “Won’t less powerful and less well-endowed parties be coopted or overwhelmed by more powerful adversaries?” they ask. “Isn’t court the only place that the parties with less political power can be sure of getting fair treatment?”

In fact, conventional approaches to resolving distributional disputes place a heavy emphasis on political power and legal rights. Legislatures are particularly sensitive to the “clout” of lobbyists and interest groups. The courts, for their part, are primarily concerned with determining past facts rather than shaping future possibilities. This favors the innocent, not the less powerful. Moreover, the courts are singularly unconcerned about future relationships. The distributional cases that wind up in court are handled pretty much like criminal cases—winners and losers are identified—because that is what the courts are equipped to do.

Less powerful groups may have legitimate concerns about entering into consensus-building negotiations, but they should be wary as well about engaging in expensive court battles when distributional issues, rather than legal rights, are at stake.
Conclusion

Power and politics are essential ingredients in all public disputes, and they cannot be ignored. But consensus-building approaches to dispute resolution place a premium on problem solving rather than “settling” disputes. When the outcomes could be life-threatening, even the most politically powerful groups should be worried about the wisdom of the agreements reached. Indeed, in many public disputes a wise outcome is much more urgent than winning. When a powerful group commits to work for consensus, it tacitly agrees that raw political power is not a sufficient basis for resolving public disputes. This empowers those who are less politically powerful. On the other hand, it takes nothing away from those with more political power because all groups retain a veto.

In most negotiations, bargaining power (as opposed to political power) is fluid. The power of good ideas (that is, proposals that meet everyone’s interests) is extremely important, and equally available to all the disputants. Cooptation is never inevitable, as any party can break off negotiations at any time.

One limit on the usefulness of consensus building is the time involved. The “average” negotiation varies between several months and a year or more. Both powerful and less powerful parties are often tempted to use other avenues that seem to offer a quick solution. The prospect of a speedy court ruling, for instance, is often difficult to resist. On the other hand, swift outcomes are most often a false hope. If disputes are not fully resolved to the satisfaction of all the parties, they merely shift to another arena. If public agencies, courts, and legislative bodies were able to act promptly, without the risk of subsequent challenge or reconsideration, consensus building would be much less attractive.

Without a doubt, the prenegotiation phase of a consensus-building effort can take a long time. All potential stakeholders must be contacted and briefed. Each group must choose a spokesperson. Appropriate intermediaries must be selected, ground rules set, and an agenda worked out. There may even be the
need for extensive fact finding before problem solving can begin. In our view, however, these are good investments. As we have said before, it is often necessary to “go slow to go fast.”

A major concern of both public officials and business interests is the possibility that splinter groups might emerge. We encounter this question frequently: “Doesn’t the prospect of splinter groups severely limit the effectiveness and applicability of consensual approaches to dispute resolution in the public sector? Why invest significant amounts of time and money in a process that can be undermined at its conclusion by a runaway faction?”

There is no way to completely eliminate the threat of splinter groups. However, there are many ways to reduce the likelihood that they will form, and there are ways to blunt their impact if they do emerge. Issues of representation and ratification require special attention for just this reason. It is hard for a splinter group to gain the political credibility (and the money) that it needs to mount an attack if every possible effort was made to contact and include potential stakeholders, including those who emerged “in mid-stream.”

If splinter groups form after an agreement has been ratified, it may still be possible to reassemble all the participants to consider concerns that were not addressed earlier. This should be up to the group as a whole. If renegotiation provisions have been included in the negotiated agreement, it is significantly easier to face and solve such problems.

Even if the negotiators cannot be reassembled, the agreement may withstand political challenges from splinter groups. “After all,” the negotiators can argue truthfully, “they had their chance to raise issues during the negotiations. The final agreement was consensual—and at least until this splinter group arose, everyone willingly accepted it.”

There is one more important point to keep in mind on the subject of splinter groups. Consensus-building approaches need only be as good as, or slightly better than, conventional ap-
approaches to resolving public disputes in order to justify their use. Conventional approaches, as we have seen, are always subject to challenge by groups unhappy with an outcome. Even when consensus building only forestalls some of these challenges—and we maintain that it can do far better—it presents clear advantages.

As we have tried to make clear throughout this book, the way to break the public disputes impasse is to deal with differences effectively. On the one hand, this means that we must find a way to cope with public disputes—to deal with them. On the other hand, and this is equally important, we should seek to settle distributitional disputes by dealing or trading across issues that the parties value differently.

Skeptics suggest that, in reality, disputing parties will find very little to trade. In extreme cases, this may be true. If the parties can find nothing that they value differently, it may be impossible to “expand the pie” or design integrative agreements. On the other hand, even in a zero-sum bargaining situation, it can be advantageous for both parties to focus on the “rules of the game.” How will they divide the pie if it cannot be expanded? This can be dealt with as a joint problem-solving task. Agreement on fair criteria for handling a zero-sum situation can enhance the prospects for successful implementation of whatever outcome is reached.

As it turns out, most public disputes are not of the zero-sum variety, even though they may be framed that way at the outset. All too often, disputants conclude that there is nothing to trade simply because they have not been thinking along these lines. In the Middletown dispute over the homeless, none of the targeted neighborhoods was offered compensation or a promise to mitigate adverse impacts. None was promised that an agreement to accept housing for the homeless could be traded off against future protection from other undesirable facilities.

In finding items to trade, it is important to range far afield.
All sorts of unconventional swaps are possible if the parties work to invent them. At the same time, there are ways to ensure that extortionate demands are not made.

THE PROMISE OF CONSENSUAL NEGOTIATION

One view of social reform in the United States is that all ideas like consensus building are fads—that they emerge from time to time, have their brief vogue, and fade away. From a conservative perspective, almost all social reforms create more problems than they solve—especially when the government is involved.

As a tool for resolving distributional disputes, consensus building does not depend on government intervention. Public agencies must be involved, of course, but in most cases both public and private institutions are involved. Consensus building can be proposed by any party. No abdication of private responsibility is involved. In fact, individual initiative is a critical component of the negotiated approaches to consensus building described in this book.

Our view of why social reforms often fail is that they are imposed from above. In effect, the government attempts to instill new values. But a stubborn fact of human nature tends to intervene. Very few people can be convinced to change their underlying sense of right and wrong—of what ought to happen and what ought not to happen—in response to a governmental edict. Thus, reforms emerge, and may even be institutionalized, but they nonetheless fail because human nature is resistant. If the vehicle of reform fails to address such underlying motivations, it is doomed.

One of the most exciting aspects of consensual approaches to dispute resolution is that once people use them, and find that
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they work, those people become advocates. The act of participation, and especially the fruits of success, changes their sense of how best to proceed. Thus, the idea of consensus building will be promulgated by the most effective advocates imaginable: those who have tried it and seen it work. Unlike most reforms, consensus building has the great advantage of built-in learning.¹ The “reformed” become the reformers.

We contend that it is precisely this kind of learning that allows a reform to take root and endure.² As a result, we are confident that consensual approaches to dispute resolution will thrive. As they do, it will be easier to avoid or break whatever impasses emerge. Consensual approaches to the resolution of public disputes will increasingly offer an opportunity to demonstrate that democratic institutions can work effectively.