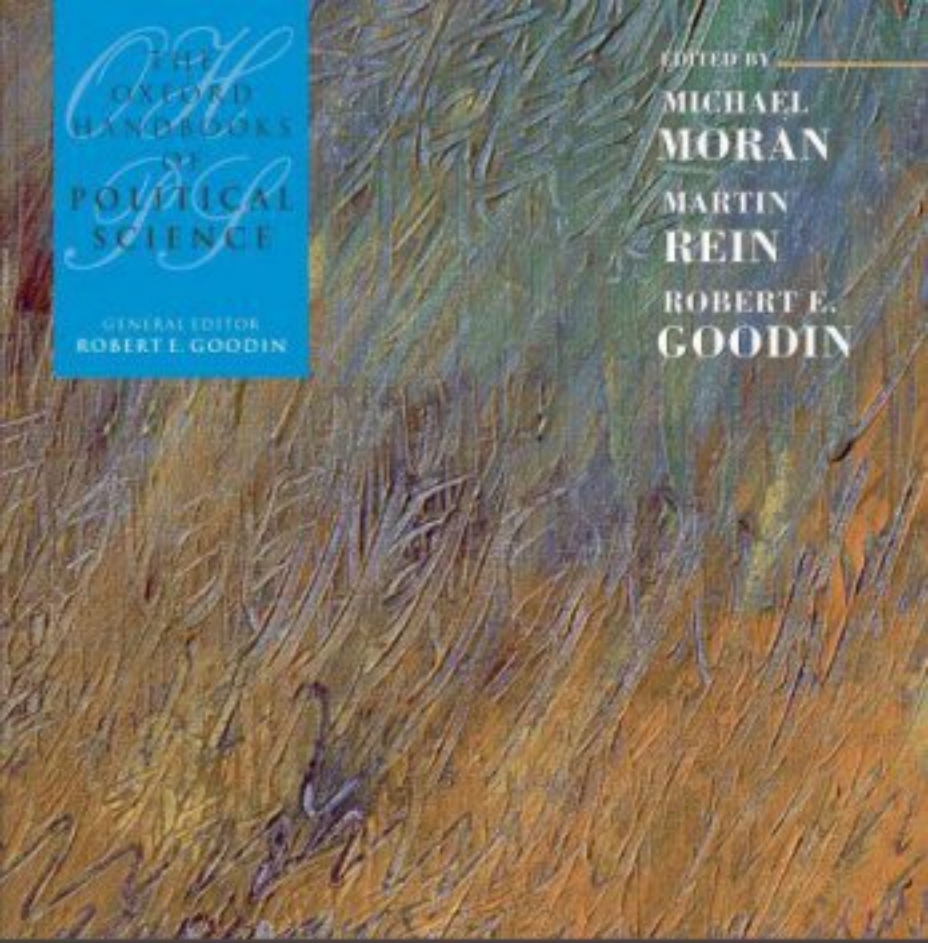

The Oxford Handbook *of* PUBLIC POLICY

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

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 Literer 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

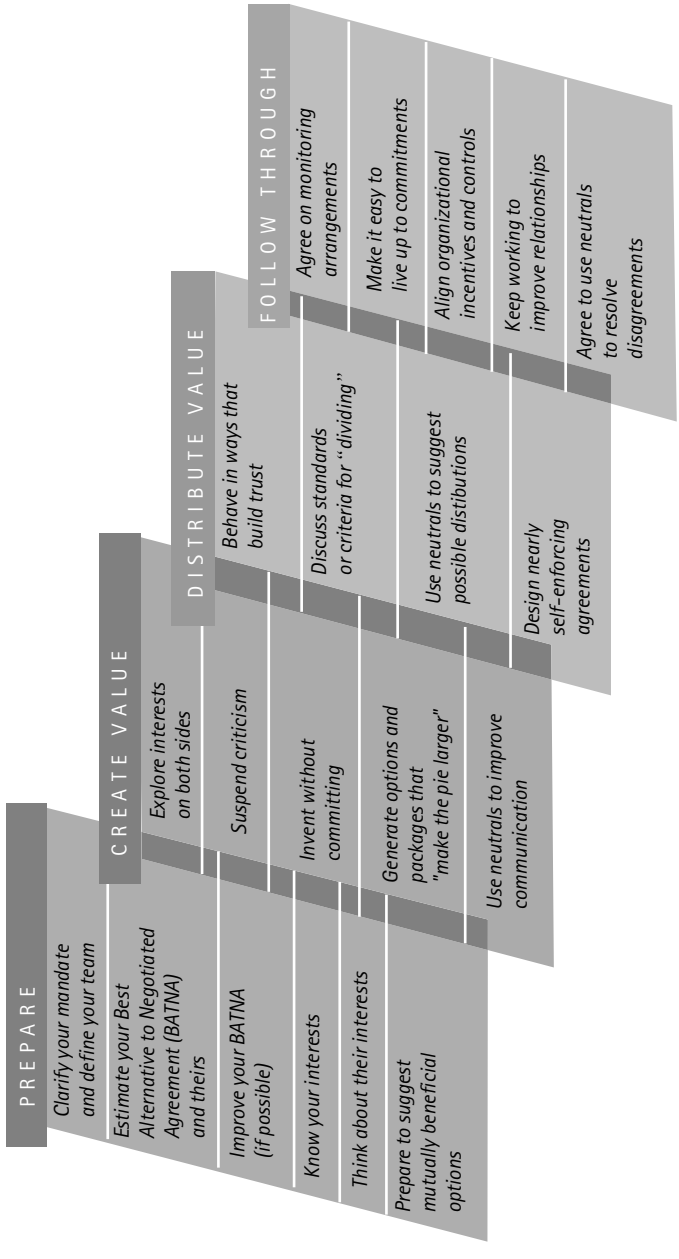

Fig. 13.1. Mutual gains approach to negotiation

Source: Susskind, Mckearnan, 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, McKearnan, 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).

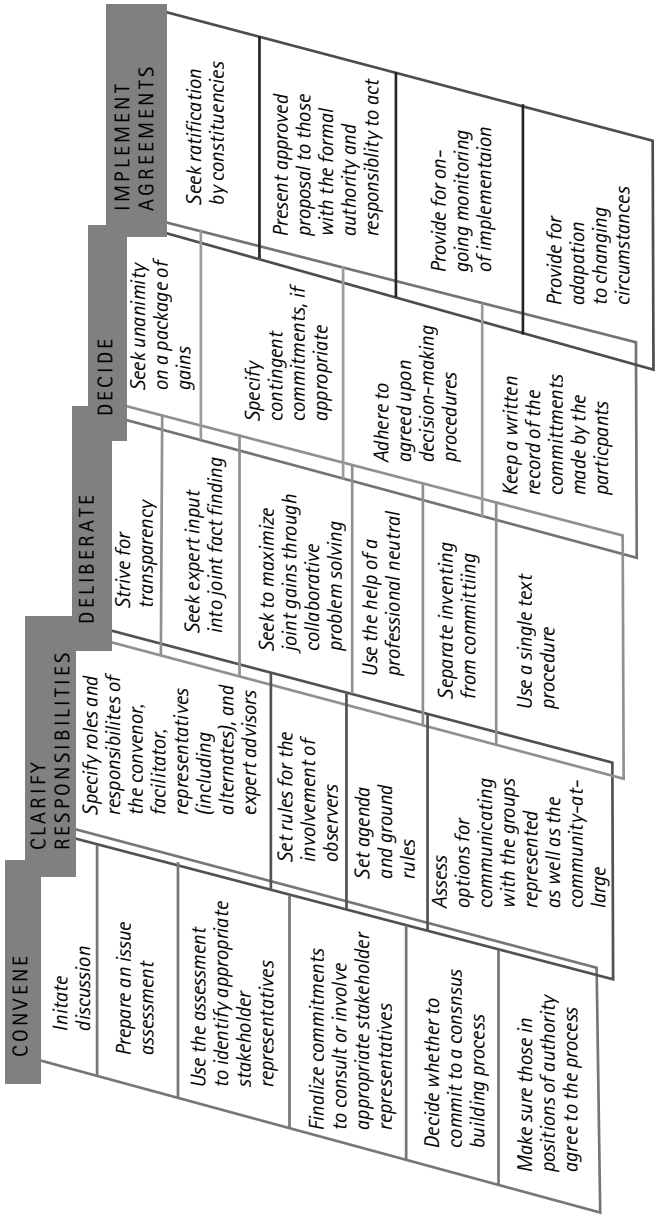

Fig. 13.2. Consensus building: essential steps

Source: Susskind, Mckearnan, and Thomas Lamar 1999.