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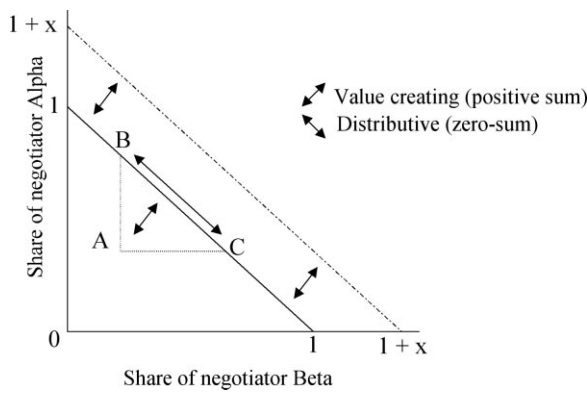
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## Negotiation and Bargaining: Organizational Aspects

Negotiation and bargaining is a process in which two or more parties seek a mutual agreement through an explicit or implicit exchange of views. The focus of this article is on international negotiation and bargaining with a special emphasis on the role of international institutions in facilitating cooperative bargains. In particular, the article discusses institutional design in connection with the nature of the problem that parties face, viewed through the lens of the provision of different types of goods.

### 1. The Diversity of Bargaining Situations

Reaching a mutual agreement may take very different roads depending on the characteristics of the bargaining situation. This section discusses the key distinction



**Figure 1**  
A mixed-motive bargaining situation

between positive vs. zero-sum situations. It then relates this basic difference to a typology of goods that parties may seek to provide through a process of negotiation.

### 1.1 Pure Conflicts of Interest: Zero-sum Situations

A widespread assumption is that bargaining is, foremost, a process in which parties seek to reconcile contradictory interests and values. The aim is to agree on a particular split of the differences between parties. Such situations have been labeled ‘zero-sum situations’ and are particularly salient when negotiators value outcomes in relative terms. In such cases, any gain by one party comes at the expense of a loss by another party. Bargaining is essentially a process of (re)distribution. In international politics, an archetype of a zero-sum situation is the division of a given territory (for instance the carving-up of the Antarctic into different national sectors). In economics, the process of allocating market shares under nongrowing market assumptions is also a zero-sum situation.

### 1.2 Mixed-motive Situations

Whereas distribution is often a key concern of bargaining, parties may also share common interests. Agreements can create value, as well as distribute it. Negotiation situations with both distributive and creative dimensions are labeled ‘mixed-motive situations.’ Figure 1 illustrates the two dimensions for a hypothetical bargaining case between negotiators Alpha and Beta aiming at establishing market shares.

Moving along the line [1,1] corresponds to the case of pure conflict of interests mentioned in Sect. 1.1. Negotiator Alpha and Beta fully control a steady market and have to mutually agree on a distribution of market

**Table 1**  
Type of goods

		Jointness?	
		YES	NO
Exclusion possible?	NO	Public	Common pool resources
	YES	Inclusive club	Private

shares. Consider, however, the case where Alpha and Beta are not the only market actors and thus will not be able to fully control the market unless they come to a mutual agreement. In Fig. 1, point A is the outcome in case of no agreement, with Alpha and Beta joint market shares lower than one. Bargaining aims at reaching total control of the market, thus creating value collectively. The collective gain must be redistributed, along segment [B, C] in Fig. 1. Another mixed situation arises when negotiators seek to expand the total size of the market, from 1 to (1+x) in Fig. 1. This does not eliminate the initial distributive aspect of bargaining but makes the potential conflict less severe.

In sum, in mixed-motive situations there may be a trade-off between individual and collective rationality. Mixed-motive situations dominate when negotiators not only care about bargaining outcomes in relative terms but also in absolute terms.

### 1.3 Bargaining Situations and Types of Goods

Bargaining situations may be characterized by different combinations of positive and zero-sum features. In particular, it is useful to distinguish four types of objects or goods that negotiators may deal with, namely public goods, common pool resources (CPRs), inclusive club goods, or private goods (see Aggarwal 1998, Cornes and Sandler 1996, Snidal 1979).

Differences among goods can be characterized along two dimensions: jointness, which refers to the extent to which goods are affected by consumption; and by the possibility of exclusion, which refers to whether noncontributors to the provision of the good can be kept from consuming it (see Table 1).

The two dimensions—jointness and exclusion—largely influence the mixture of interests in a bargaining process. In the case of public goods, there is an important value-creating potential—given that actors can consume the same amount of the good without affecting the consumption of others (as in the case of national defense). Yet, the possibility of cost sharing creates a distributive aspect to this good. Given the impossibility of excluding noncontributors, there is in fact a dual distributive problem—among those who pay for the good and between those who pay and those who do not.

Inclusive club goods refer to the case of goods that exhibit jointness (not diminished, by use), but where exclusion is possible (for instance satellite transmission of television). In this situation, bargaining reveals a strong value-creating feature and the problem of distributing costs is less problematic than in the case of public goods because of the possibility of excluding noncontributors from the consumption of the good. The availability of exclusionary mechanisms may help generate revenue, which further reduces the initial problem of cost distribution.

The positive potential of cooperation to collectively produce private goods tends to be complicated by the distributive problem created by the lack of jointness (for instance, the provision of a system of irrigation that delivers private amounts of water to different field owners). Yet, the availability of exclusionary mechanisms can alleviate the problem of distributing the costs. By contrast, in the case of common pool resource goods, bargaining is essentially a distributive process among those that are willing to pay for the good and between them and the non-contributors.

## 2. Bargaining Situations and the Role of Institutions

When and how do institutions affect patterns of negotiations? We begin with a definition of institutions, and then turn to an examination of the role they might play. The most readily evident role for institutions could be for situations of market failure, described nicely by the Prisoners' Dilemma. In such cases, institutions may help to overcome sub-optimality and ensure that actors reach a mutually superior outcome by cooperating. But as noted in Sect. 2.2, other bargaining situations might also benefit from institutions. Section 2.3 briefly examines some theories that help explain the bargaining process leading to the formation of institutions themselves.

### 2.1 Definitions: Meta-regimes, Regimes, and International Institutions

International institutions have been defined in many ways, and considerable disagreement remains over the differences among international organizations, international institutions, and international regimes. International organizations are generally seen to be more formally specified institutions, with a secretariat, permanent office, and the like. International regimes have been defined as sets of principle, norms, rules, and decisions upon which actors' expectations converge (Krasner 1983). It is useful to distinguish between principles and norms on the one hand, and rules and procedures on the other. This allows us to delineate two aspects of institutions: meta-regimes and regimes (Aggarwal 1998). Whereas meta-regimes

represent the principles and norms underlying international arrangements, international regimes refer specifically to rules and procedures. Regimes can be examined in terms of their characteristics: their strength, nature, and scope. Strength refers to the stringency of the multilateral rules that regulate national behavior; nature (in an economic context) refers to the degree of openness promoted by the accord; and scope refers to two aspects: (a) the number of issues incorporated in the regime, or issue scope; and (b) the number of actors involved (bilateral or multilateral), or institutional scope. To summarize, international institutions consist of meta-regimes and regimes; if they are highly formalized, we can refer to them as international organizations.

### 2.2 Institutional Designs for Different Goods

Institutions affect the strategies available to actors and the payoffs linked to various bargaining outcomes. Systematic and specific links between bargaining situations and institutions have been explored through strategic analysis of actors' behavior (Aggarwal and Dupont 1999; for earlier efforts, see Snidal 1985, Stein 1982). Aggarwal and Dupont (1999) model negotiation processes over the provision of diverse types of goods with game-theoretic structures that correspond to different assumptions about the costs and benefits of these goods and variation in actors' capabilities. They derive a variety of games (including the situations known as Prisoners' Dilemma, Chicken, Assurance, Harmony, Deadlock, or Battle of the Sexes; for a taxonomy of situations see Rapoport and Guyer 1966) that can be solved using the Nash equilibrium concept (Nash 1951). Issues of institutional design are then discussed in connection with the evaluation in terms of efficiency of the predicted outcome(s) of the various games. This analysis yields the following findings on the role of institutions in bargaining situations.

First, institutions may help secure positive outcomes in bargaining processes. When actors have large resources and when they face public and CPR goods, conflict may prevent the provision of such goods. Institutions can play the role of a third party in such cases and enforce a mutual agreement, making the parties more willing to settle on a bargaining outcome in the first place. To successfully overcome the tendency of players to defect, institutions should be strong and formalized. When actors have fewer resources, free riding is less of an option and the problem is one of developing mutual confidence in the ability of the other actors to implement a bargain. In such cases, institutions may provide insurance schemes against defection.

Second, institutions may reduce distributive problems. They may eliminate some sharply asymmetric outcomes and may provide focal point solutions for

both cost sharing (which applies to all types of goods) and benefit splitting (when there is no jointness of supply, that is, for private and CPR goods). Institutions with a firmly and widely established meta-regime tend to perform these tasks well.

Third, institutions are not useful only for their help in the initial provision of various types of goods, but also may provide ongoing benefits. For instance, institutions may be useful even if there is some powerful political entrepreneur, or hegemon, that provides public goods. Hegemons wish to coerce weaker actors to move away from free riding on the unilateral provision of goods and wish to have them carry some of the burden. They try to do so by linking the provision of the good with other issues. This can be done through institutions that connect different issues.

Fourth, institutions help clarify the mechanism of exclusion. Goods are rarely naturally given but must often be constructed. Actors in international relations use institutions to construct and enforce exclusionary mechanisms. Careful institutional design might therefore transform problematic goods such as public or CPR goods into less problematic bargaining situations such as club goods.

### 2.3 Bargaining to Create Institutions

While institutions may help facilitate or alter the costs and benefits arising from the bargaining process, institutions themselves are the result of a bargaining process. We can consider three schools of thought that have been used to explain the formation of institutions (see Aggarwal 1998 for references on these three schools of thought). First, from a neorealist power-based tradition, states in the international system compete for security in an anarchic international system. For analysts in this school, international institutions are simply reflections of the existing balance of power, and institutional outcomes have distributional consequences, that is, benefits from cooperation may be unequal.

The neoliberal tradition, on the other hand, emphasizes the incentives that states have to cooperate. In the neoliberal framework, states create 'rules of the game' (i.e., institutions) based on certain agreed-upon norms. Institutions foster sustained cooperation as well as lower information and transaction costs in a particular issue-area. International institutions are seen to be 'sticky'—that is, existing institutions constrain future institutional change—and new institutions must be designed to be either 'nested' within, parallel, or independent from existing institutions (Aggarwal 1998). Nested institutions are hierarchically ordered. Parallel institutions refer to an institutional division of labor, while independent institutions are simply unconnected since their mandates do not overlap.

The cognitive perspective stresses the role of expert consensus and the interplay of experts and politicians in the formation of institutions. Those within the cognitive tradition are concerned with how the development of knowledge can foster learning on a particular issue area that may drive policy innovation.

### 3. Future Research Directions

The issue of institutional design, both at the international and domestic level, will remain a key research and policy challenge for the future. Analysts are increasingly recognizing the need to precisely specify the types of bargaining situations for which institutions might be needed. Rather than debating if institutions are necessary or useless, future work will provide us with a more precise understanding of the nature of goods and their relationship to institutions. Together with insight into the factors that contribute to the creation of institutions themselves, we will achieve a better understanding of the conditions under which institutions facilitate and contribute to the bargaining process.

*See also:* Conflict/Consensus; Conventions and Norms: Philosophical Aspects; Dispute Resolution in Economics; Game Theory; Game Theory: Non-cooperative Games; International Arbitration; International Communication: History; Negotiation and Bargaining: Role of Lawyers; Prisoner's Dilemma, One-shot and Iterated

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## Negotiation and Bargaining: Role of Lawyers

Negotiation is an interactive communication process that occurs whenever we want something from someone else or another person wants something from us (Shell 1999). Often treated by law schools, legal scholars, and lawyers as an alternative dispute resolution or 'ADR' process, see *Mediation, Arbitration, and Alternative Dispute Resolution (ADR)*, negotiation is the ADR process that lawyers in America and around the world are likely to employ most often. Whether functioning as litigators trying civil cases; as transactional or corporate lawyers putting together deals; as policymakers or advisors proposing and revising rules and regulations; or as prosecutors or defense counsel litigating criminal cases, lawyers negotiate.

### 1. Negotiation Models

Scholars have identified two basic models of, or approaches to, negotiation. The first, and perhaps most familiar, is variously labeled the 'adversarial' or 'distributive,' or positional model of negotiation (Gifford 1985, Lewicki et al. 1994). This adversarial model of negotiation posits that negotiation is a zero-sum game in which any gain one party receives is necessarily at the expense of the other party. Because it views negotiation as a zero-sum game, the adversarial model counsels negotiators to attempt to accumulate as many of those gains as possible through the use of such tactics as extreme opening positions, few (and small) concessions, commitments to positions, and the withholding of relevant information (Gifford 1985). The adversarial model, in short, places a primacy on claiming value in negotiation.

The downside to the adversarial model, at least according to its critics, is that it is often harmful to the relationship between the parties and can easily lead to impasse or to negotiated agreements that leave value on the table. To address these shortcomings, scholars have developed a second approach to negotiation, currently fashionable in American law schools (as well as business, public policy, and international relations schools), called the 'problem-solving' or 'integrative,' or 'principled' model of negotiation (Fisher et al. 1991, Menkel-Meadow 1984, Walton and McKersie 1965). The problem-solving model of negotiation posits that

negotiation is not necessarily a zero-sum game. Rather, most negotiations are (or at least have the potential to become) collaborative problem-solving exercises in which the parties work together to devise creative, 'win-win' outcomes. Given this view of negotiation, the problem-solving model counsels negotiators to focus on the parties underlying interests in negotiation, to devise creative options that help satisfy both parties, interests, and to develop and use legitimate, objective criteria that both parties view as applicable to the negotiation (Fisher et al. 1991). The problem-solving model, in short, emphasizes both creating and claiming value in negotiation.

Neither of the primary negotiation models is sufficient to capture the complexity of legal negotiations as a positive matter, and in all likelihood, neither is sufficient as a prescriptive guide, either. Lawyer-negotiators no doubt do, and probably should, borrow liberally from either or both negotiation model(s) depending upon the nature of the negotiation, the relationship between the clients, the practice area, the norms in the community, and relevant legal standards and rules.

Available empirical evidence suggests, however, that lawyer-negotiators tend to rely somewhat more heavily on one model or the other when negotiating. According to one empirical study, for instance, lawyer-negotiators evaluating their adversaries rated 65 percent of them as cooperative or problem-solving negotiators, 24 percent as competitive or adversarial negotiators, and only 11 percent as incapable of categorization (Williams 1983). A more recent empirical study of American civil litigators found that most of them express a preference for the problem-solving model of negotiation but tend to behave more consistently with the adversarial model of negotiation (Heumann and Hyman 1997).

### 2. Negotiation in the Legal System

Lawyers perform myriad roles in America and around the world. Broadly speaking, though, lawyers' work typically falls into one of two categories: dispute resolution or deal making. Negotiation is central to both.

#### 2.1 Dispute Resolution

Many lawyers function as dispute resolvers. Civil litigators and criminal defense attorneys, for instance, are dispute resolvers. Dispute resolvers spend much of their professional lives helping their clients settle disputes through negotiation.

Most disputes do not require lawyers, however, because most disputants settle their disputes on their