

Chapter 3

Managing the Negotiation Process

Abstract In global public health negotiations, the stakes are usually high and often time is of the essence. The outbreak of the SARS epidemic in late 2002, for example, illustrated how rapidly crises can occur and how immediate action may be required. Negotiations on immediate and short-term issues such as SARS, and even on long-term policies not triggered by a crisis, can be made all the more complex by diverse interests, conflicting understandings of underlying facts and linkages among the multitude of issues. Specific obstacles to joint problem-solving may include disagreement on the existence, certainty or severity of the problem; on the best way to tackle the problem or the likelihood of success; or on who bears responsibility to act, who will pay costs and who will manage the response. In the health sector, national leaders in key countries may be reluctant to acknowledge the urgent need to address the spread of a disease, either because they question the facts or because they fear that taking action will have negative impacts on their international image and/or domestic political support.

Keywords Negotiation • Negotiation process • Joint fact-finding • Interests • Interest-based negotiation • Stakeholder process • HIV/AIDS • Intergovernmental Working Group on Public Health, Innovation and Intellectual Property (IGWG) • Intergovernmental Panel on Climate Change (IPCC) • World Health Assembly (WHA) • Commission on Intellectual Property Rights, Innovation and Public Health • Mutual gains approach • Preparation • Value creation • Value distribution • Follow through • Implementation • Best Alternative to Negotiated Agreement (BATNA) • Alternative • Alliance of Small Island States (AOSIS) • Doha Declaration on TRIPS and Public Health • World Trade Organization (WTO) • Positions • Indonesia • Avian flu virus • Options • Brazil • Brainstorming • FCTC • Pandemic influenza preparedness negotiations • Criteria • Framework convention on climate change • Contingent agreements • Issue mapping • Issue trade-offs • Single text approach • Modes of decision-making • Building trust • Culture

To deal with these obstacles, health-related negotiations must include effective strategies for reaching a shared understanding of the facts, creating options that meet the primary interests of the key stakeholders, and “packaging” options and trade-offs into agreements that stakeholders see as fair. This chapter presents an approach to negotiation that offers an alternative to “hard bargaining”—a way to overcome obstacles to agreement by focusing on producing gains for all key stakeholders.

3.1 Establishing a Shared Understanding of the Facts: Joint Fact-Finding

Negotiations on international public health issues often take place in an atmosphere of urgency and crisis. When the SARS epidemic caught the world’s attention in March 2003, efforts to contain the virus were undertaken immediately and took place in a climate of continuous and intense media reporting that magnified the urgency of the threat (“Q&A: SARS” 2004).

In critical situations such as these, it is important to define and resolve technical and scientific questions to the fullest extent possible at the outset of the decision-making process, in order to avoid time loss and suboptimal outcomes. However, efforts to establish the facts and define technically feasible options for joint global action are often confounded by the problem of “dueling experts.” The dueling experts problem arises when stakeholders who disagree on the basic facts of the issue and/or the effectiveness of a particular response bring forward experts in support of their respective views. This problem undermines negotiations in several ways:

- It often results in the introduction of one-sided and incompatible scientific evidence, which is seen as authoritative by its supporters and spurious by those on the other side. Experts may feel the need to defend their work and criticize the assumptions, methods and findings of their counterparts. Such polarized expert debates make it more difficult for stakeholders to come to a common reading of the facts. Experts on the effects of patents on innovation of new products and of access to these products often face conflicts of interest that undermine their claims of neutrality and objectivity in presenting scientific evidence on these issues. Experts’ close ties to industry, NGOs or governments may affect others’ perspectives of those experts’ opinions and have a significant impact on their ability to seriously engage in a joint systematic review and discussion of the data. This can happen at both the national and international levels. In May 2003, for example, a panel convened by the U.S. National Institutes of Health recommended the broader use of hypertension drugs at lower blood pressures, but nine of the eleven authors of the guidelines had ties to drug companies (Wilson 2005).

- Less wealthy countries may not have equal access to experts. These countries may thus be at a significant disadvantage compared to rich countries, which can magnify their voices, and therefore enhance their negotiating power, through experts. And such disparities might make it easier for industrial lobbyists to influence a negotiation, despite their conflicts of interests.

The dueling experts dilemma prolongs the process of finding consensus and frustrates stakeholders who are not technical experts. This dilemma often results in suboptimal solutions based on political compromise within the range of arguments presented by the dueling experts. As an example, some believe that conflicting scientific evidence and the lack of a joint establishment of technical and scientific facts resulted in the watering down of findings presented in reports by the UN Intergovernmental Panel on Climate Change on the likely damaging impacts of climate change; in that case, language calling for cuts in greenhouse gases was eliminated at the insistence of diplomats whose pursuit of specific political agendas was facilitated by the presentation (Eilperin 2007). Conversely, email comments by climate scientists suggesting that they had avoided publishing data that did not support their global warming hypotheses caused a surge in attacks by climate science “skeptics,” who argued that climate scientists were letting their personal values bias their research. Though an independent panel ultimately determined that the scientists had not manipulated data in ways that biased their research findings, the controversy damaged the credibility of the international climate science community (BBC News Online 2010).

The problem of dueling experts is exacerbated in the public health context by the cross-national and cross-sectoral nature of the issues. Each of the broad array of non-health-related stakeholders affected by a public health issue may seek out an expert to argue for the scientific evidence in favor of their position. The cross-sector linkages can also lead to clashes between rival epistemic communities—groups of experts with a deep knowledge of an issue area, such as infectious diseases, intellectual property, the pharmaceutical industry or primary health systems. These clashes are particularly hard to address because experts from different epistemic communities do not focus on the same set of factual questions. For example, one expert may focus on the best way to contain an infectious disease, while another concentrates on the likely impacts of travel restrictions on international trade. As a result, these experts may “talk past” each other while claiming to have the most relevant expertise on the issue at hand.

As an example, in 2006 the Bush Administration announced a \$15 billion emergency plan for combating HIV/AIDS in Africa that promoted abstinence until marriage as a primary approach to fighting the pandemic. The UN Special Envoy on AIDS, Stephen Lewis, criticized this program as actually undermining the efforts of African countries to fight the epidemic, claiming that abstinence programs had been shown not to work. In the ensuing public exchange of mutual criticisms, each side claimed a lack of evidence for the other’s position while pointing to “evidence” of their own (BBC News Online 2006).

Fortunately, there is an alternative to the dueling experts scenario—*joint fact-finding*. Joint fact-finding is a process in which diverse stakeholders work together to define the technical and scientific questions to be asked, and then jointly identify and select qualified experts to assist the group as a whole in finding answers. The stakeholders, together with mutually agreed experts, proceed through several steps. They refine the factual questions; set the terms of reference for technical or scientific studies; monitor, and possibly participate in, the study process; and review and interpret the results. While most joint fact-finding is done during the pre-negotiation phase, the technique can be applied throughout a negotiation process whenever there is a need to establish a common set of facts.¹

The diagram on the next page highlights the main steps in a joint fact-finding (JFF) process, with specific actions for each step. Each step has one or two main purposes:

Assess the need for JFF: The critical first step in any JFF process is to clarify the scientific and technical issues to be addressed, based on an understanding of stakeholders' main concerns and questions, and of their willingness to collaborate in exploring the issues. Normally a stakeholder, or an outside body with an interest in promoting collaboration, will play the role of convener—that is, a party who invites (and may seek to influence and persuade) other stakeholders to participate in a joint fact-finding effort. Often conveners will ask the help of a neutral party who has both process facilitation skills and technical understanding of the issues to conduct a stakeholder assessment. The assessor will seek to talk with all primary stakeholders to understand their interests and concerns overall, and to see whether and under what conditions they might be interested in participating in a joint fact-finding process. The assessor may provide a report back to the convener and all the stakeholders interviewed, with an assessment of the feasibility and desirability of proceeding with joint fact-finding, and with recommendations on how to structure the JFF process. It is of course ultimately up to the stakeholders themselves to decide whether and how to proceed (Fig. 3.1).

In conducting the assessment, it is very important to distinguish scientific and technical questions from conflicting interests and values. JFF is useful for helping stakeholders investigate empirical issues in a constructive way, but it is not a substitute for interest-based negotiation or for dialogue to address underlying value conflicts. For example, it may be possible for stakeholders to answer the question “how prevalent is HIV/AIDS in our region?” through JFF. On the other hand, JFF alone cannot answer the question, “who should have the lead responsibility for HIV/AIDS education?” when there are conflicting organizational interests that must be negotiated; nor can it answer the question: “what proportion of an international program budget should go to HIV/AIDS prevention and treatment, and how much to other infectious diseases?” Answering that question will require both interest-based negotiation among professionals and constituencies with

¹ For an overview of joint fact-finding, see Ehrmann and Stinson (1999).

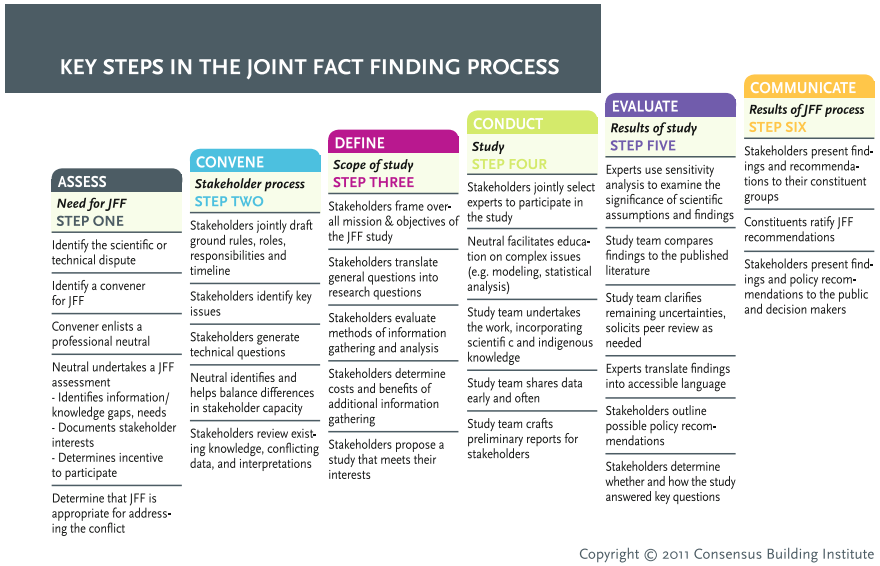


Fig. 3.1 Key steps in the joint fact finding process

different public health concerns, and dialogue about public values at stake in the allocation of scarce funding among different population groups.

It is equally important to assess the willingness of stakeholders to collaborate in exploring the issues. Stakeholders may be hesitant to collaborate on JFF for several reasons: because they believe that they already know the answers to the questions; because they believe that they can achieve their goals regardless of whether others agree with their view of the facts; because they do not believe others will participate in good faith, or because of a combination of these factors. The assessor needs to explore these concerns with hesitant stakeholders, in order to determine whether and how a joint fact-finding process could be designed to respond to stakeholder interests and concerns.

The assessor normally produces a report, in writing and/or as a face-to-face presentation to the convener and all stakeholders who have been interviewed. The assessment report should clarify the issues that could be addressed through joint fact-finding, the views of stakeholders on the potential for JFF to help them meet their goals, the options for proceeding with JFF and other means of addressing stakeholder concerns (e.g. direct negotiation). It should conclude with the assessor’s own recommendations.

Convene the stakeholder process: If the stakeholders do agree to undertake joint fact-finding, the next step is to bring them together (convening them) to begin the JFF process. The key decisions to be made at this stage are to define the goals of the JFF process, the roles and responsibilities of participants, the core issues to be investigated, and the way that stakeholders will use information developed through JFF in their negotiation and decision-making. Stakeholders may also

decide to use the services of a neutral facilitator to help them with the fact-finding process, and/or may ask the convener to provide ongoing technical and facilitation assistance.

In scoping the core issues, stakeholders should make use of existing studies and data and share their perspectives on the facts, with the understanding that existing information is not meant to resolve the major issues, but rather to clarify what information already exists, where there are gaps and disputes, and therefore where JFF is most needed to resolve outstanding questions. It is usually helpful to have a written statement of the goals and ground rules for a JFF process, and to establish a time frame for each JFF activity. A neutral facilitator can help the parties reach agreement on these critical “constitutional” issues as they begin the JFF process.

Define the scope of the study: This step takes the stakeholders further into the detail of determining the specific research/technical questions that need to be asked and answered, the methods to be used, and the experts/resource people who will do the work. For example, if stakeholders reached agreement that the core question for investigation was to determine “globally, how effective are abstinence and contraception methods for HIV/AIDS prevention for at-risk groups,” they might then work together to define the methodology for reviewing the effectiveness of each prevention approach. For example, they might decide to rely only on a literature review of existing evidence, or to commission new clinical trials of each approach, or a hybrid with a literature review followed by clinical studies only to address questions not fully resolved by the literature review.

Conduct the study: After agreeing on questions and methods, the stakeholders need to select experts or resource people to help answer the questions. In some cases, stakeholders may be capable of conducting some of the investigation themselves, with agreement on ground rules to assure objectivity in their work. In other cases, stakeholders may need outside expertise and/or may lack trust in each other’s ability to carry out study tasks objectively. Stakeholders then need to agree on outside experts to bring in. To avoid recreating the “dueling experts” problem in a joint fact finding exercise, it is useful for the stakeholders to agree on the criteria for expert selection first, then jointly evaluate experts and seek agreement on well-qualified individuals who are able to be impartial investigators of the questions.

During the study, stakeholders may ask for periodic reporting, or may simply wait for the results of the study to come back, and then discuss the results. The greater the complexity of the questions and the methods (for example, clinical trials are generally more complex and time consuming than a literature review), the more benefit there may be for stakeholders to discuss progress reports with the investigators. When stakeholders begin with highly uneven levels of technical understanding, periodic discussions with credible, impartial experts can help balance the level of technical sophistication among stakeholders. Conversely, through ongoing discussions with stakeholders, experts may learn more about the core questions and concerns that are driving the stakeholders, and may modify

their approach to answering the questions in order to be as responsive as possible to stakeholder interests.

Evaluate: When the experts have completed their effort to answer the questions posed by the stakeholders, they need to make sure that their findings are credible both for the expert community and for the stakeholders and their constituencies. First, they need to clarify the explanatory power of their findings (whether statistically or through qualitative interpretation), and the sensitivity of findings to assumptions and conditions specific to the study design. Stakeholders and experts may also seek external peer review in some cases. Second, the experts need to communicate their findings in a way that is clear and accessible to the stakeholder representatives with whom they have been interacting directly, and to the constituencies that the stakeholders represent. For example, the findings of a study on the effectiveness of abstinence and contraception approaches to HIV/AIDS prevention may be of significant interest to a wide range of constituencies, to the media and the public at large. The experts will need to craft their report in language that makes the questions, methods, findings and interpretation as clear and accessible as possible to a broad audience.

However, expert interpretation is not the only or even the most important form of interpretation in a joint fact finding exercise. It is critically important that the experts have direct dialogue with the stakeholder representatives about their findings, and that the stakeholders themselves test and refine their own interpretations of the results jointly. Only through dialogue about the findings can the stakeholders gain the greatest benefit of a JFF process: a shared understanding of what is known and what is not on a complex factual issue. For example, the findings on abstinence and contraception approaches to HIV/AIDS prevention might show a significant variation in the effectiveness of each method, depending on the approach to information, education and communication with at-risk populations; the particular population in question; and the presence or absence of complementary public health interventions and services. To make the findings useful in resolving disagreement among the stakeholders, the experts and the stakeholders would need to have an extended discussion of the findings and their sensitivity to specific assumptions and conditions, and stakeholders would need to ask a number of “what if” and “what about” questions in order to fully probe the implications of the study.

Communicate: The final step in a JFF process is to communicate the results beyond the core group of stakeholder representatives, to their constituencies and the public. The initial expert presentation might be refined in response to stakeholder discussion, and stakeholders themselves may take direct responsibility for communicating the findings to their constituencies, either jointly with experts, or using written material produced by the experts. Likewise, stakeholders and experts might speak jointly to the media in order to present a shared understanding of the study results.

It is important to underscore that simply reaching agreement on the answers to a set of factual questions may not resolve all—or even the most important—of the issues that the stakeholders need to address. For example, knowing that promotion

of contraceptive use is on average more effective than abstinence promotion for a particular age group may not resolve the question of whether it is morally acceptable to promote contraceptive use with that age group. The stakeholders may still face a difficult negotiation challenge in determining how best to use the results of joint fact-finding to resolve non-factual concerns.

Though it cannot resolve non-factual concerns, joint fact-finding by stakeholders with expert assistance does offer four major benefits. First, it enables parties in a negotiation to explore difficult topics together. Exploring the issues jointly allows stakeholders to develop a common knowledge base and an understanding of the “range of uncertainty”—the specific topics on which definitive factual answers do not exist. It also enables stakeholders to resolve disputes about technical and scientific methods, data, findings and interpretations before a negotiation begins. The amount of time and effort spent debating scientific issues during a negotiation can thus be dramatically reduced.

Box 3.1 Joint fact-finding efforts by trade and health officials can be particularly beneficial. Through this process, trade officials can gain a better understanding of the implications of strengthened patent protection, while health officials can become better equipped to discuss the economic costs and benefits for their countries of receiving better access to foreign markets. In contrast, where fact-finding is undertaken in a non-collaborative fashion, important perspectives may be missed. The latter occurred in a study by a trade ministry in Central America, which suggested that the short-term impact of increased patent protection would be limited, in particular, in relation to foreign market access benefits. Because health officials did not take part in the development of this report, it disregarded the long-term impact of increased patent protection on drug access and the policy options available to counteract the impact of the Central America Free Trade Agreement on drug prices (e.g., the parallel importation of drugs and the use of compulsory licenses) (Blouin 2007).

Second, joint fact-finding allows those stakeholders with less knowledge, education or expertise to learn more about the technical issues involved and the sort of data required at the international level. This enables negotiation on a more equal footing. For example, joint fact-finding on linkages between health and economic issues can be very helpful to health agencies in developing countries, generating good analyses that might not otherwise be available to them. In addition, representatives involved in international joint fact-finding may be better able to explain issues and policy options to leaders and key constituents in their home countries.

Experience has shown that taking the time before (or in) a negotiation process to develop a better technical understanding of the essential issues markedly improves the process and can in fact lead to better outcomes. The experiences of the Intergovernmental Working Group on Public Health, Innovation and Intellectual Property (IGWG) and the negotiations on virus sharing underscore the benefits of developing a joint understanding of technical issues, especially as diplomats without specific scientific knowledge often lead delegations. The IGWG

was established in 2006 as an intergovernmental working group open to all Member States to draw up a “global strategy and plan of action” that would provide a “medium-term framework” and would, *inter alia*, aim to secure “an enhanced and sustainable basis for needs-driven, essential health research and development relevant to diseases that disproportionately affect developing countries” (World Health Assembly 2006). The initial negotiating session was relatively ineffective, as many of the delegations were confronted by complex issues not typically addressed by those in the public health realm. Many delegations came to the meeting without having done the necessary technical work and stakeholder consultations—the pre-negotiation preparation that would have facilitated a better outcome at this initial plenary session. A series of regional and inter-country meetings was subsequently organized to enable the national delegations to better understand the issues, dialogue with key stakeholders and develop negotiation options. When the delegations met a year later in plenary, the negotiating process was markedly improved.

Similarly, in the virus sharing negotiations in 2006 and 2007, the secretariat undertook to make detailed technical presentations on substantive issues concerning influenza and other health issues before and during each intergovernmental meeting. Diplomats highly appreciated these presentations on such technical issues as steps in the vaccine production, on which they were negotiating text—an event which often happens during a long and protracted negotiation process. The presentations facilitated a common understanding of the issues, and were particularly important for diplomats who were newcomers to the issues due to their recent change in postings and responsibilities.

The third benefit of joint fact-finding is that it facilitates greater creativity and better agreements. It enables parties to draw on each other’s experience, knowledge and ideas, and can often result in innovative agreements that no single party could have generated alone. As there is no universally perfect method for collecting and analyzing evidence about health, and different circumstances call for different methods, the high level of collaboration enabled by joint fact-finding is vitally important. It results in a firmer technical and scientific foundation for later decisions or recommendations.

The fourth benefit is that joint fact-finding helps to improve relationships among parties with differing interests and perspectives. It enhances communication, fosters trust and helps build a deep understanding of others’ interests, needs and values. Thus, it can bridge the gap between rival epistemic communities and between science and policy-making, thereby enabling more health-sensitive global policies. In addition, the shared investment of time, ideas and resources into jointly discovering good information increases the level of commitment among the parties to reaching a mutually agreeable outcome. The efficiency of a multi-stakeholder negotiation is further enhanced by minimizing the formation of adversarial coalitions supporting differing schools of thought.

In practice, joint fact-finding can take several forms:

- *Multilateral joint fact-finding institutions.* The Intergovernmental Panel on Climate Change (IPCC), the Millennium Assessment Process, and the Scientific Advisory Committee on Tobacco Product Regulation are recent examples of multilateral bodies created to conduct joint, integrated assessments that are technically credible and responsive to key policy questions.

Box 3.2 The IPCC was established in 1988 by the World Meteorological Association and the United Nations Environment Program and has recently completed its Fourth Assessment Report, *Climate Change 2007*. The IPCC offers many lessons, both for the increasingly important role health has played in each subsequent Assessment Report and the compositional changes of the assessment teams, which have over the years come to include more experts from developing countries and from a broader array of issue areas. The resulting ever-widening IPCC focus has slowly and hesitantly turned a mostly scientific, chemistry-focused enterprise into a more authentic, integrated assessment for sustainable development.

- *Non-institutional (more ad hoc) joint fact-finding processes convened by international organizations such as the WHO or by countries, to explore specific issues.* For example, throughout the negotiation of the FCTC, the WHO and a number of states convened technical conferences and consultations on topics ranging from “Potential Liability and Compensation Provision for the Framework Convention on Tobacco Control” (WHO 2001) to “Avoiding the Tobacco Epidemic in Women and Youth” (WHO 1999).
- *Joint fact-finding processes organized on a nongovernmental or quasi-governmental basis.* These processes—including entities such as health commissions—usually precede the initiation of official or institutional processes. One example is the Commission on Macroeconomics and Health, chaired by Dr. Jeffrey Sachs, which demonstrated and quantified how health contributes to economic growth; it found that “health status seems to explain an important part of the difference in economic growth rates [among countries], even after controlling for standard macroeconomic variables,” and thus characterized health as a good investment (Sachs 2001, p. 24). Another is the Commission on Intellectual Property Rights, Innovation and Public Health, which, looked at how to move research and development funds into diseases that affect the poor. It found that where the market does not work, mechanisms other than intellectual property rights are needed in order to provide the incentives for research and development. Ultimately, the commission process resulted in a global strategy for public health innovation and intellectual property. Another commission—the Commission on Social Determinants of Health, which had extensive knowledge networks of experts, showed that where one lives, plays and works are important determinants of health outcomes and need to be integrated into the development

of strategies for better health. This commission brought equity to the forefront; it showed that where one lives and plays is as important as the health care system in the community in which one lives.

3.2 Developing Options and Packages: The Mutual Gains Approach

Once the issues have been framed and some shared understanding of the facts has been established, the actual negotiation stage begins. The conventional view of complex international negotiations is that they are necessarily conflictual, with stakeholders battling to achieve incompatible goals. As an example, developing countries may seek to gain low-cost access to medicines produced in developed countries, challenging intellectual property rights that allow title-holders to charge prices above marginal costs. Developed countries, on the other hand, may seek to protect their domestic drug manufacturers and insist on the implementation of property rights legislation as mandated by TRIPS (Correa 2006). The magnitude of global public health challenges such as these demands the development and use of truly effective negotiation strategies.

The conventional strategy in these kinds of cases, unfortunately, is hard bargaining. In hard bargaining, parties set out extreme positions, withhold information and make concessions grudgingly. Interpersonal interactions may be difficult, especially when the representatives or their organizations have a history of conflict, or when they are skeptical of each other's commitment to a good-faith negotiation process.

The problem with a hard-bargaining approach is that it assumes that interests are incompatible and mutually exclusive. In reality, most multi-party, multi-issue international negotiations have at least some potential for all stakeholders to make gains relative to the *status quo*. In the public health context, the presence of many stakeholders and many issues generally allows for substantial joint gains among most stakeholders on some, if not all, issues. Hard bargaining fails to realize those gains, however, and settlements are less likely to be economically, environmentally or socially sustainable.

Potential joint gains may likewise be left unachieved where a "soft bargaining" strategy is adopted. In this approach, negotiators avoid contentiousness at all costs and sacrifice their own interests in order to reach agreement and maintain good interpersonal, organizational or inter-state relations. Or they may give into a more powerful party in the hopes of gaining something (or avoiding negative action) in another domain such as trade or development assistance.

In most cases, the most efficient and sustainable negotiation outcomes can be achieved by seeking to meet one's own interests *and* those of one's counterparts, thus preserving and improving ongoing relationships with other negotiators and the organizations they represent. The *mutual gains approach* to negotiation,

developed at the Program on Negotiation at Harvard Law School, is a strategy for achieving efficient and sustainable negotiation outcomes in this manner.

Applying the mutual gains approach can greatly improve one's capacity to meet public health goals. It offers strategies for each of the four stages of the negotiation process:

1. Preparation (before the negotiation)
2. Value creation (initial stages of developing options that are advantageous for all sides)
3. Value distribution (reaching agreement)
4. Follow-through (implementation)

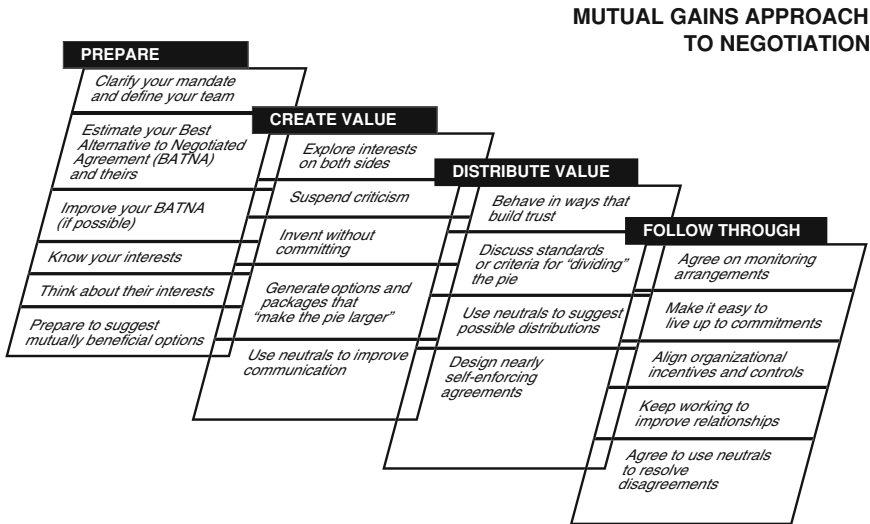
Box 3.3 The key principles of the mutual gains approach are:

- Prepare effectively by focusing on stakeholders' interests and best alternatives to a negotiated agreement (BATNAs)² and by generating initial proposals for mutual gains.
- In value creation, begin by exploring needs and interests, not by stating positions.
- To find potential mutual gains, use no-commitment brainstorming to develop options and proposals that might meet both one's own needs and interests *and* those of other stakeholders.
- Seek maximum joint gains before moving to value distribution (i.e., making commitments and deciding "who gets what").
- When distributing value, find mutually acceptable criteria for dividing joint gains.
- In follow-through, ensure that agreements will be sustainable by committing to continuing communication, joint monitoring, contingency planning and dispute resolution mechanisms.

The following sections describe and offer advice regarding the first three steps of the mutual gains process, in the global public health context; step four, follow-through, will be discussed in [Chap. 6, Meeting Implementation Challenges](#).

Figure 3.2 provides an overview of the mutual gains approach.

² Best Alternative to Negotiated Agreement (BATNA) is a term of art popularized in Fisher, Ury and Patton (1991). It refers to what a negotiating party will do or can get *away* from the negotiating table, without the agreement of the other side. It is his/her *alternative* to agreement with the other side.



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Fig. 3.2 Mutual gains approach to negotiation

3.2.1 Getting to the Table: Preparation

The first step in the mutual gains approach is preparation for the negotiation. At the core of preparation is a careful, dispassionate analysis of the relevant parties, their goals and interests and their alternatives to a negotiated agreement. It is very important to know one’s own interests, one’s alternatives if the negotiation fails to produce agreement (i.e. one’s “no negotiation” alternatives, or BATNA) and one’s minimum acceptable conditions for the agreement (“bottom line”) based on an assessment of those alternatives. When representing others, preparation together with constituents, colleagues and/or leaders is critical. Finally, in order to be able to develop options for mutual gain, it is *equally essential* to understand the interests, alternatives and bottom lines of one’s negotiation partners.

Good preparation has both substantive and psychological benefits. Substantively, well-prepared negotiators maximize their ability to get what they want. Psychologically, they can keep cool during the negotiation process, be creative and be helpful to their negotiating partners—without going to extremes of “giving in” or “playing hardball.”

The Alliance of Small Island States’ (AOSIS) participation in multilateral climate change negotiations illustrates the benefits of good preparation. AOSIS negotiators were highly effective in making their countries’ concerns heard and having their national interests met, because they rigorously prepared for each negotiation session and developed briefing books for AOSIS members. They focused on helping each other identify their strengths and capitalize on their resources, so that they would be in at least as good a position as any other

developing country delegation. For this purpose, they frequently brought in experts on specific topics to brief them in detail. Moreover, they analyzed their negotiating partners' interests and constraints, especially developed country parties, and developed options and arguments that responded to them. Thus fully prepared to engage in substantive discussions, the AOSIS representatives gained political influence and were not ignored. Instead, thorough preparation enhanced their credibility in the negotiation process (see [Chap. 9](#)).

Developing countries were similarly prepared and played an equally influential role in negotiating the Doha Declaration on TRIPS and Public Health, which was approved by trade ministers at the Fourth WTO Ministerial Conference in Doha, Qatar, on November 14, 2001. The Declaration was the product of months of negotiations that examined TRIPS and its impact on the public health sector. Developing countries largely achieved their objectives in these negotiations because of their level of preparation. They submitted several official written proposals and were clearly abreast of important concepts behind the major issues to be resolved. As early as the TRIPS Council's first special session on access to medicines, the Africa Group, side-by-side with many other developing countries, issued a paper on its view of the relationship between TRIPS and access to medicines. It also introduced a set of limiting principles on the procedural aspects of the negotiation to follow. The paper consistently cited the applicable portions of TRIPS and offered effective interpretations of TRIPS. Through their strong understanding of the legal foundations of the issues in the negotiation, the developing countries were able to make effective arguments in support of their interpretation of TRIPS.³

3.2.1.1 Distinguishing Interests From Positions

Central to effective preparation is the analysis of negotiating parties' interests. The mutual gains approach focuses on interests rather than positions. A *position* is the stance a party takes on an issue (e.g., "we are going to allow domestic drug producers to manufacture generic drugs without first obtaining licenses" or "licenses must be given by patent holders for production of generic drugs"). It is what a party is demanding, its advocated solution. In contrast, an *interest* is the core need, want, fear or concern that underlies a position and forms the reason(s) and goal(s) behind the position—*why* the party wants its position (e.g., "we need access to affordable, life-saving drugs for our large and impoverished population," or "we fear that companies will not invest in research and development of new and important medicines").

³ See "Analyzing a Complex Multilateral Negotiation: The TRIPS Public Health Negotiation," [Chap. 7](#) in this volume.

Box 3.4**Distinguishing Interests From Positions****Position:** What you want**Interest:** Why you want it**Focusing on Interests in Negotiations**

- In preparation, analyze both your interests and their interests
- At the table, explain your interests
- Ask questions and listen to discover their interests

Negotiators' interests may include, for example, protecting public health, promoting development, making a profit, satisfying shareholders, enhancing organizational reputation and image, generating resources to pursue their missions, improving relationships with key counterparts, establishing precedents for future negotiations or gaining fair treatment on an issue, among many others.

By focusing on interests rather than positions, negotiators can open up new possibilities for mutual gains or a way out of a deadlock. A position is one way to meet an underlying interest, and is often presented as a "take it or leave it" choice. In contrast, an interest may be met in any number of ways, and it does not have to be presented as a demand or ultimatum. Often, the discussion of interests can open up space for brainstorming options—i.e., ways to meet the interests of the participating stakeholders—while the presentation of positions can leave negotiators feeling as if they have little to discuss.

To prepare effectively for negotiation, it is essential to clarify one's own interests. One useful way to distinguish interests from positions is to state something that might be an interest, and then ask oneself: "Why do we want that?" "What do we want that for?" "Why is that important to us?" If the answer is a more general way to achieve the same goal, yet something that might still be negotiable, the negotiator has made progress toward more clearly defining his or her interests. For example, a negotiator might first state his or her interest as "increasing staffing in our primary health clinics." After asking "why?" the negotiator might answer, "to improve primary health care service delivery." The second statement may be a more useful framing of the interest, because there may be alternatives to increased staffing in the primary health clinics that could be equally or more effective in improving primary health service delivery. A good test of whether one is really getting to interests is whether there is more than one solution to meet the interest; if the stated "interest" leads to only one solution, then a negotiator should continue to ask, "why?"

In an organizational context, negotiators should define their interests through dialogue with those whom they will be representing, be they senior managers, colleagues and/or constituents. Jointly answering the "why" questions should help clarify organizational goals, and may also be a good way to identify trade-offs or competing interests within the organization. However, the process of defining organizational interests in a negotiation does not end when the representative goes

to the negotiation table. On the contrary, effective negotiators maintain regular communication with those they represent during the negotiation process, to summarize the status of negotiations, test possible options and trade-offs and reassess interests in light of new information and ideas.

As negotiators define their own interests, it is equally important that they assess the likely interests of their negotiation partners. This is often easier when a negotiation takes place between organizations and individuals who have worked together before, understand each other well and understand the issues well. It may be much more difficult when the negotiators and their organizations do not know or understand each other, where the issues and options are not entirely clear, or where there are clearly different or opposing positions. The negotiation of health issues involving the WHO secretariat in Geneva, Switzerland, for example, often involves health attachés from country missions who are posted in Geneva. The attachés' frequent formal and informal contact among themselves and with the WHO secretariat responsible for convening and servicing the negotiations builds a certain level of trust and understanding that can greatly facilitate identification of underlying interests.

In the Intergovernmental Working Group on Public Health, Innovation and Intellectual Property (IGWG), for example, the initial positions of countries presented during the first plenary session reflected differing views on intellectual property and its effects on innovation and access. Developing countries rejected intellectual property rules, while the pharmaceutical industry insisted on preservation of the existing patent system in relation to development of drugs, including for "diseases of the poor." Little progress was made until regional and country consultations were held, and countries began to understand the issues, their own interests and other countries' interests. While positions were rigid, interests were less opposed; developing countries were concerned about the development of drugs for diseases of the poor, while industry did not want intellectual property to be undermined in areas where the market worked. This understanding of the interests of the parties revealed possibilities for options regarding pharmaceutical development for "diseases of the poor" that could satisfy both sides. Part of the agreed strategy and action plan was to come with innovative financing mechanisms for diseases of the poor.⁴

⁴ See The Global Strategy and Plan of Action on Public Health, Innovation and Intellectual Property (GSPoA), WHA 61.21 (61st World Health Assembly, 24 May 2008) and WHA 62.16 (62nd World Health Assembly, 22 May 2009), http://www.who.int/phi/implementation/phi_globstat_action/en/index.html. See also Expert Working Group on R&D financing and coordination. The Expert Working Group was formed as a "results-oriented and time-limited Expert Working Group" in response to the World Health Assembly Resolution on the Global strategy and plan of action on public health, innovation and intellectual property to "examine current financing and coordination of research and development, as well as proposals for new and innovative sources of funding to stimulate research and development related to Type II and Type III diseases and the specific R&D needs of developing countries in relation to Type I diseases." (Expert Working Group on R&D financing 2010, <http://www.who.int/phi/ewg/en/index.html>).

Similarly, in negotiations over virus sharing that resulted in the adoption of WHA60.28 (2007), Indonesia initially refused to share samples of the H5N1 (avian flu) virus, claiming that under the Convention on Biological Diversity, access to and use of virus samples obtained in Indonesia could occur only with Indonesia's consent. Led by the United States, other countries insisted that Indonesia was obliged to share data and virus samples without preconditions, and that Indonesia was in violation of the International Health Regulations 2005. A focus on the underlying interests permitted a resolution under which Indonesia resumed sharing of the H5N1 virus. Indonesia's interests were in gaining benefits from the knowledge and technologies derived from use of the samples, while the interest of the US, WHO and others was in containing the spread of the virus, and, more generally, in preserving and strengthening the global surveillance system and the development of intervention strategies to deal with such epidemics. The WHA resolution did not resolve the legal question of whether unconditional virus sharing was required by the IHR 2005; instead, it outlined processes for agreeing to terms and conditions for sharing of viruses between the originating countries, WHO Collaborating Centres and third parties, as well as for ensuring resulting fair and equitable sharing of benefits, while directing the WHO Director General to establish an international stockpile of vaccines "for use in countries in need in a timely manner and according to sound public-health principles, with transparent rules and procedures".⁵

The greater the uncertainty or difference of views regarding the negotiating topic, the greater the potential benefit of "doing one's homework" on the interests of counterpart organizations and their representatives. It is important to consider: What is their overall set of goals? What involvement have they had in this issue to date? What publicly available statements, papers, news reports or other documentation outline their views on the issue? Does anyone in one's own organization have a personal connection to the counterpart organizations, from whom the negotiator could hear some of the counterpart's perspectives on the issues? Doing some work to answer these questions will increase the potential for joint gains in the negotiation process, and will help to identify areas of potential conflict. Negotiators can use a relatively simple worksheet like the one on the next page to organize their thinking in preparation.⁶

With a clear understanding of one's own interests, and good information or well-educated guesses about the interests of others, the negotiator has taken the first solid step on the road to effective preparation.

⁵ World Health Assembly Resolution 60.28, para 2.2 (23 May 2007).

⁶ See also the Negotiation Preparation Worksheet in Appendix 2.

Negotiation Preparation Worksheet

	Ourselves	Stakeholder A	Stakeholder B	Stakeholder C
Interests?				
BATNAs?				
Questions to ask others?				
Options that are good for us and acceptable to others?	Issue 1 Issue 2 Issue 3			
What makes our preferred options fair?				
Implementation challenges and ways to address?				
Other issues/strategies				

3.2.1.2 Assessing and Defining Aspirations, BATNAs and Minimum Requirements

Knowing interests is necessary but not sufficient for effective preparation. It is also important to define the spectrum of acceptable outcomes for oneself and consider what that spectrum might look like for the other negotiators. Acceptable outcomes may range from minimum requirements (the least that a negotiator can accept) to aspirations (the best possible outcome to satisfy a negotiator’s interests).

To define aspirations, one must have a clear conception of one’s own preferences and a clear enough sense of the interests of others to ensure that one’s own aspirations will not be perceived as “nonstarters.” For example, if one’s interest is to develop an effective regional infectious disease surveillance program, one’s aspiration might be to establish a new standing body to carry out the surveillance program, with full participation by all of the health ministries, funded by regional and global health donors. That aspiration might be very appropriate if all the health ministries in the region are willing in principle to participate, and the potential donors have signaled interest in funding such a body. If it is clear that some governments are not keen to participate, however, or that there is little donor

interest, the negotiator should ask whether the aspiration is overly ambitious, and if so, reformulate it. A redefined aspiration might be to gain agreement among a core group of health ministries to pilot a self-funded surveillance system, and to seek full regional coverage and external funding after the pilot phase.

Having defined his or her interests and set an aspiration, the negotiator should decide the minimum outcome (i.e., the bottom line) that he or she would be willing to accept in an agreement. To determine one's bottom line, it is essential to consider what alternatives are realistically available to advance one's interests if an agreement cannot be reached. One's "best alternative to a negotiated agreement," or BATNA, should be the basis for calculating the bottom line.

A BATNA is *not* the same as a bottom line. One's BATNA is the best alternative for meeting one's interests away from the negotiating table, if it is not possible to reach agreement with one's negotiating counterpart(s)—a "plan B" in case negotiations do not produce anything that meets one's most important interests. In the surveillance example, the negotiator's BATNA might be to strengthen his or her own country's partnership with a regional health organization to provide the best available data on regional infectious disease incidence to his or her Ministry of Health. This alternative would not require the agreement of the other countries at the negotiating table nor additional donor funding.

Once the negotiator is clear on his or her BATNA, the next step is to define the minimum acceptable outcome of the negotiation—the bottom-line outcome that is just slightly superior to one's own BATNA. If the best possible proposed agreement (resulting from a good faith effort to create joint gains) is not better than the BATNA of the negotiator, then he or she should say "no thanks" to the proposed agreement and go with the BATNA. Again using the surveillance example, if only one other country in the region is interested in a joint approach to surveillance, and harmonizing procedures and communications with that country would be more costly than making more use of the data already collected by a regional health organization, then the negotiator should say "no thanks" to the bilateral surveillance agreement and proceed to strengthen communications with the regional organization. On the other hand, a deal with two out of three neighboring countries, including the country that poses the highest cross-border infectious disease risks to one's own country, might be good enough to beat the negotiator's BATNA.

From this presentation of BATNA analysis, it should be clear that a negotiator who prepares well never accepts a deal that is not better than his or her BATNA. A good BATNA is a significant source of bargaining power. For example, if one is negotiating a pharmaceutical licensing agreement with a company, and another pharmaceutical company with a comparable product is also very interested in reaching a licensing agreement, one has a good BATNA in the negotiations with the first company. On the other hand, if the drug in question is critical to public health and only one company is offering to license it, then one's BATNA may not be very good, and one may need to work especially hard in the negotiation process with that company to generate a mutually acceptable outcome.

Of course, assessing the BATNAs of one's negotiation partners is also absolutely critical to effective preparation. Having a good sense of the BATNAs of

others should give the negotiator a clear idea of how far he or she needs to go to meet their interests in the negotiation. If negotiation partners have very good BATNAs, then one's own proposals will have to meet their interests very well. If one's negotiation partners do not have good BATNAs, then one's own proposals can offer less to them and claim more value for oneself. However, the effective mutual gains negotiator does not focus primarily on getting as much as possible for oneself at the expense of others, even if others have weak BATNAs. On the contrary, the effective mutual gains negotiator seeks agreements that meet the interests of all parties as well as possible, in order to create strong commitment to implementing the agreement and realizing joint gains.

The negotiator may have to do quite a bit of detective work to understand the BATNAs of negotiating partners. It even may require educated guesswork. Generally it is not in the interests of negotiators to reveal their BATNAs, and asking too directly about the BATNAs of others may raise questions about one's commitment to engage in good-faith negotiations. It may be possible to shed light on others' BATNAs by doing research that does not require direct contact with the potential negotiating partners. For example, researching a pharmaceutical company's current licensing arrangements and opportunities—based on data available on the Web, from business analysts and from countries that have licensing agreements with the company—may help the negotiator form a clearer sense of the company's likely BATNA (in this case, perhaps potential licensing agreements with other countries). Even if it is not possible to generate a very clear picture of negotiating partners' BATNAs, it is important to try, in order to put one's own negotiation strategy on as firm a foundation as possible, and also to recognize areas of uncertainty and identify questions to pursue during the negotiation process.

Whenever possible, a negotiator preparing to come to the table should not only assess and understand his or her current BATNA, and that of the other party(ies), but should also seek to *improve* his or her own, and *worsen* the other's. For example, if one were preparing for a licensing negotiation with a pharmaceutical company, it would be highly advantageous to see whether any other companies have a comparable product, and if so whether they are interested in licensing the product, before sitting down with the first company.

The benefit of investing time and effort in improving one's BATNA is illustrated by the case of Brazil's negotiation for access to HIV/AIDS medicines. The bilateral dispute between Brazil and the United States over Brazil's protection of intellectual property gained momentum when Brazil introduced a program of fighting AIDS and changed domestic legislation to facilitate its implementation, including permitting local manufacture of HIV/AIDS drugs. The U.S. believed the new program directly violated Brazil's obligation to protect intellectual property rights under the TRIPS agreement. Brazil, on the other hand, maintained that it had the right to use all necessary means to save its population from the AIDS pandemic. Among the most effective tools used by Brazil in these negotiations was the development of a very good BATNA—providing a framework for local production of drugs, as well as supporting local manufacturers and building coalitions with other developing countries with a strong pharmaceutical sector. Brazil also worked effectively on

strategies to weaken the United States' alternatives to a negotiated agreement, enhancing its bargaining power significantly. Brazil took advantage of available assets, such as international law, domestic intellectual capital and the fallback option of legally issuing compulsory licenses for AIDS drugs and having the capacity to proceed with local manufacturing in case negotiations failed (see [Chap. 8](#)).

3.2.1.3 Preparing Options and Proposals for Joint Gain

Once a negotiator clarifies his or her own interests, BATNAs and minimum requirements, and forms well-educated guesses on those of his or her negotiating partners, it is time to formulate some options and proposals to bring to the negotiating table. A well-prepared negotiator comes to the table with one or more options and proposals that would meet one's own interests very well and are likely to meet the interests of other negotiators well enough to become the basis for further discussion. Each option should demonstrate a solid grasp of the issues and their technical, financial and institutional context; an understanding of the interests of negotiating partners; and one's own commitment to find agreements that are good for all or nearly all of the negotiators, not only for oneself.

In preparation, the basic question the negotiator needs to answer is, "Given what I know of my own interests, the interests of other negotiators, our BATNAs, the set of technically feasible options for meeting our interests and the resources that appear to be available to us, what could I propose that would meet my own interests well and would also be attractive to other negotiators?" Answering this question may be simple. In the case of a pricing negotiation for a drug with a well-defined market, there may be a well-established price, and the negotiation may turn on whether and how much discounting is feasible or how one might avoid setting a precedent for negotiations with other countries. Alternatively, answering this question may be extremely complicated. In negotiating a global strategy on intellectual property issues or a treaty on tobacco control, hundreds of actors and dozens of issues may be involved, and creating a proposal that can meet the interests of each actor on every issue may not be the most efficient way to prepare. Instead, the well-prepared negotiator:

- Considers the core issues that would have to be addressed in an agreement;
- Identifies the key parties whose agreement on the core issues could catalyze broader agreements with other actors on other issues;
- Develops one or two options on each of the core issues; and
- Considers what might need to go into a package agreement across all the issues in order to gain the support of the key parties.

Whether simple or difficult, preparing options to bring to the table is an extremely important part of any negotiator's preparation. In a sense, a negotiator who prepares options carefully anticipates the whole negotiation. He or she can gain a great deal of leverage in the negotiation process by identifying potential areas of agreement,

differences that will need to be bridged to “create value” once the negotiators are at the table and options that might serve as bridges to agreement.

The negotiator should keep in mind one caveat as he or she moves from the preparation phase to the negotiating table: the options generated during the preparation phase should not become positions. They are ideas meant to jump start the value creation process. The negotiator should retain an open mind with regard to the efficacy of these ideas, as they will be more fully informed once the negotiator reaches the negotiating table and encounters his/her counterpart(s).

3.2.2 “Enlarging the Pie:” Value Creation at the Negotiating Table

Positional bargaining often results in “lowest common denominator” agreements or agreements about which all the parties are equally unhappy—if any agreement is reached at all. By contrast, the mutual gains approach challenges parties to “enlarge the pie”—to create as much value as possible for all stakeholders in the initial stages of a negotiation, before deciding “who gets what” in a final agreement. *Value creation* means inventing options that meet parties’ interests well—meaning that the options are significantly better for all negotiators than their BATNAs and ideally are closer to their aspirations than to their bottom lines.

The pre-negotiation preparation steps just discussed are critical in enabling effective value creation. But they are not enough. The dynamic interaction of negotiators in a face-to-face setting has a profound effect on whether mutual gains can be realized at the table. It may generate new information, ideas, obstacles and options that no negotiator could fully anticipate during the preparation process. And if the interaction involves exchanges of positions, proposals and counter-proposals, or is adversarial, value creation may be undermined, and even options that are advantageous for all parties may be rejected. It is therefore important for the negotiator to have a strategy and tools for making face-to-face negotiations as constructive as possible. The mutual gains negotiator has two particularly powerful strategies, each with a simple tool. First, *clarify interests* by asking and answering “why?” questions. Second, *create and refine options for joint gain* by asking “What if?” questions; these allow negotiators to brainstorm ideas without saying that they will necessarily agree to any of the options under discussion. We will discuss each of these in turn.

The well-prepared negotiator comes to the table with a clear sense of his or her own interests, a good guess as to the interests of other parties. A good negotiator must also explore interests with the other side directly to make sure he or she understands them well before moving on to propose options. Asking questions of other negotiators is the best way to jointly explore and clarify others’ interests.

Questions should be asked sincerely, not as a debating tactic and not as a way to undermine other negotiators. For example, a mutual gains negotiator will not ask, “Why are you being so vague?” or “Why can’t you simply agree to what seems

like an obvious point?” Instead, a mutual gains negotiator will ask, “Can you clarify that for me? I’m not sure what you meant...” or “I’m having a hard time understanding your concern on that point. Do you have a different understanding of the facts, or do you share my understanding of the facts but disagree about what I’ve proposed we do in response?”

Box 3.5 What it sounds like to explore interests:

- “What are the key things you need from an agreement?”
- “Why is that important to you?”
- “What else is important to you?”
- “Would you prefer [X] or [Y]?”
- “Could you live equally with [option X] and [option Y]? What do you like about the options?”
- “You’ve mentioned [X] and [Y] and [Z] as things that matter to you. Among these, which is most important?”
- “What concerns you about this proposal?”

With a solid understanding of interests, negotiators can then explore multiple options for resolution or collaboration using “what if” questions: “What if we tried a different option that could work for me, and if I understand your interests correctly, could work for you too?” or “What if we tried an option along these lines—would this be moving in the right direction?”

In order to find options that potentially meet all parties’ needs, rather than make offers, it is useful first to suspend judgment about ideas that are raised and to invent options without making substantive commitments or even attributing ideas. The more options parties can come up with, the more likely they are to find something that will work for themselves and others. The “what if” technique avoids locking parties into their preconceived positions and ideas before all potential options have been explored.

Brainstorming without committing—in other words, without accepting or rejecting options—is difficult. The creative brainstorming process may be facilitated by involving representatives—such as mission staff in Geneva—who are explicitly *not* authorized to make decisions, at least at that point in the negotiation. Such informal processes can be part of the negotiation itself. In the FCTC process, for example, six important and difficult issues were discussed in informal meetings during the fifth session of the Intergovernmental Negotiating Body. At the sixth and final session, two informal groups were created to discuss the topics that were still causing hesitation among representatives: financial resources (which some developing countries said they required in order to comply with the convention) and advertising/promotion (which some developed countries were hesitant to restrict). These sessions led to the development of options that facilitated conclusion of an agreement on the FCTC text.

Box 3.6 Rules for Brainstorming

1. **Invent without committing:** brainstorming proposals are not formal offers. They can be discussed, but cannot be accepted or rejected
2. **The more options, the better:** be creative and come up with many ideas, even if some of what you invent is not workable
3. **The test of options is how well they might meet interests:** try to invent options that would be good for all parties; and focus discussion on how an option might be improved to meet more interests or meet interests better
4. **Work on the problem together:** in a brainstorming session, encourage negotiators to express their interests and concerns clearly, but all negotiators should be working together to find new ideas and options, not on defending their positions or their preferred options

The brainstorming process may, alternatively, occur outside the negotiating sessions themselves, or between sessions, amongst representatives in Geneva, for example, or in consultations with the chair or secretariat, as occurred in the FCTC process as well. This underscores the importance of a mission's involvement in the pre-negotiation and negotiation process. Countries who do not have missions in Geneva, as well as small missions that cannot devote time to all issues, can be at a disadvantage in this process. However, they can overcome this disadvantage in part by participating in regional groupings and strategic alliances, as well as pushing for and participating in regional consultations organized by WHO or other international organizations.

Whatever approach is used, the basic point is to avoid locking into positions by creating an atmosphere of joint problem-solving rather than hard bargaining negotiation. Nevertheless, there are situations in which a bad history and/or negotiating strategy make it hard for the parties to talk to each other openly. In these cases, an impartial third party can help the parties to communicate and develop options. During the Pandemic Influenza Preparedness negotiations, for example, seven countries involved in the Oslo Foreign Policy and Global Health Initiative convened pre-negotiation sessions aimed to let key delegations better understand each others' positions on elements of the negotiation text. This facilitated agreement on certain parts of this text in subsequent formal negotiation sessions.⁷ Similarly, during the end game of the IGWG in Public Health, Innovation and Intellectual Property negotiations, through a 'friends of the chair' group the chair facilitated the final tradeoffs that were needed to successfully conclude the negotiations on the global strategy. Here, as in many multilateral negotiations, the "third party" consisted of parties to the negotiation who had a strong interest in

⁷ For more information on the Intergovernmental Meeting on Pandemic Influenza Preparedness, see http://apps.who.int/gb/pip/e/E_Pip_oewg.html. The Intergovernmental Meeting requested the Director General of WHO to convene an open-ended working group (OEWG) to continue working on this issue.

achieving an agreement and whose substantive interests were sufficiently represented by other delegations for them not to have to advocate for them.

In the climate change negotiations on emissions reduction targets for industrialized countries (leading ultimately to the creation of the Kyoto Protocol to the Framework Convention on Climate Change), a number of think tanks and conflict resolution organizations organized informal brainstorming sessions on difficult issues. Most of these sessions involved a mix of government negotiators, experts and advocates from environmental groups and industries. Some were facilitated by professional facilitators, others by experts with reputations for impartiality. Sessions ranged from a few hours to a few days in length. Several of these sessions generated useful ideas that participants fed back into the formal negotiation process, including the idea that eventually led to the creation of the Clean Development Mechanism (Martinez and Susskind 2000).

3.2.3 *Reaching Agreement: Value Distribution*

Once negotiators have generated good options that all or nearly all parties see as potentially better than their BATNAs, they may still face hard choices as they seek to finalize an agreement by choosing among the options identified. The third step of the mutual gains approach, *value distribution*, offers strategies for achieving joint gains while dealing with the reality that not all parties will be equally satisfied with any proposed agreement. The danger for negotiators is that the struggle to “get the biggest piece of the pie” they have created will undermine the potential for reaching a mutually beneficial agreement.⁸

To reduce the risk of deadlock, the mutual gains negotiator first seeks an agreement on “objective” principles, standards or criteria for choosing among options, instead of resorting to hard bargaining. “Objective” does not mean “right,” but rather, acceptable to all parties as a reasonable and fair way to make a decision, and not just as a cover to justify individual preferences. Such criteria in the public health context might include the probability of reducing infection rates,

⁸ For example, a potential home buyer may be willing to pay more than the minimum amount a seller would be willing to accept. If both sides use hard-bargaining ploys, however—with the seller claiming he will not accept less than the initial asking price, and the buyer claiming she will not pay more than her initial offer—they may not reach a deal, even though a mutually beneficial price does exist that is significantly better than their bottom lines. The mutual gains prescription here would be for each to assess their BATNA to see whether further negotiation was in their interest. Assuming it is (i.e., there is not a more attractive house available to the buyer, and the seller does not have or expect a better offer), the two negotiators should look for criteria, such as the prices of comparable homes in the same market, that both would agree are a fair basis on which to set the price. It might also be possible for the buyer and seller to introduce new options on issues other than price, such as the time needed to complete the sale, or the completion of repair work, that could make it easier to reach a “package agreement” that buyer and seller would both consider fair.

morbidity and/or mortality; program cost-effectiveness; impact on incentives for research and development; equity in cost sharing; and administrative feasibility, among many others.

It is often useful to develop agreement on guiding principles, standards or criteria at the beginning of a negotiation process. Doing so can create a sense of shared purpose and mutual understanding among representatives in a negotiation, prior to a detailed exploration of the facts and the development of options. And there is an additional benefit: At the outset, negotiators do not yet know for certain what options will be developed during the negotiation, and so they are less likely to engage in hard bargaining for criteria that are very narrowly targeted to their preferred options. For example, it may be easier to reach agreement on the criterion “highest probability of reducing infection rates” at the outset of a negotiation, when there is still substantial uncertainty about which approach might best reduce infection rates. If the discussion of criteria happens after joint fact-finding and option development have produced two options for a health intervention, each strongly supported by a different set of parties, and each with a different probability of reducing infection rates, then discussion of the criterion “higher probability of reducing infection rates” is likely to be colored by the conflicting interests of the two sets of parties.

In the negotiations to create the Framework Convention on Climate Change, one of the most challenging questions was how to create a fair balance of responsibility between developed and developing countries for responding to climate change. This issue almost deadlocked the negotiations several times. Developed countries recognized their historic responsibility for fossil fuel burning, but were concerned that fast-industrializing developing countries’ emissions were now growing much faster than their own. Developing countries took the view that developed countries had created the problem and should take responsibility for correcting it, without constraining developing countries’ industrialization paths. Skillful negotiators from developed and developing countries ultimately worked out a principle of “common but differentiated responsibility” for reducing the risk of climate change:

The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof (Framework Convention on Climate Change 1992, Article 3, paragraph 1).

The Convention gave shape to this principle by committing developed countries to begin reducing their emissions first, and to provide financing and technology to developing countries to enable them to reduce the rate of growth of their emissions without compromising their economic development prospects.⁹ However, the principle and the general commitments laid out in the Convention did not tightly constrain the actions to be taken by developed and developing countries, allowing them latitude to work out details through further negotiation.

⁹ For a multi-participant negotiation history, see Minzter and Leonard (1994).

Often it is not possible to discuss and agree on criteria at the beginning of a negotiation. Negotiators can still avoid hard bargaining among competing proposals during the *value distribution* phase of the negotiation by asking questions about the criteria on which the proposals are based. Particularly for negotiators from developing countries, insisting on and discussing appropriate objective criteria for choosing among options can be a powerful tool to resist coercion or pressure from more powerful negotiating counterparts.

Box 3.7 What it sounds like to explore criteria:

- “How did you arrive at that?”
- “What makes that fair?”
- “How can I justify this to my people?”
- “What kind of argument would your people need to hear to support this?”
- “How are others (people, organizations) handling this problem?”

If the parties themselves cannot come up with mutually acceptable criteria, they might present their preferred outcomes to a neutral third party they trust for input and/or a decision—for example, someone from the private sector or civil society sector with experience with the issue at hand.

3.2.3.1 Resolving Disagreement through Trade-Offs and Contingent Agreements

Even with a good set of options and fair criteria, disagreements about “dividing the pie” will still arise. One way to resolve them is to trade “across” issues that parties value differently. For example, imagine you are involved in a negotiation wherein you could negotiate a trade-off across two issues: a cost-sharing formula and the role of civil society in implementing a treatment program. Imagine that you care more about maximizing the role of civil society, and your counterparts care more about minimizing the cost of implementation. You might therefore accept a higher cost-share, to be borne by you or by civil society. In exchange, your counterpart might accept more civil society involvement in implementation.

Box 3.8 Methods for evaluating options:

- Categorize and prioritize
- Rank order
- Criteria matrix—compare options against criteria
- Highlight advantages and disadvantages
- Ask people, “What do you like about...?”
- Consult decision-makers, community leaders and experts
- Hold a straw vote
- Use “rejection” voting to eliminate less-preferred options

If a direct trade-off across issues is not possible, another way to resolve the disagreement is to make a *contingent agreement*. A contingent agreement is a way for participants who cannot be sure about the impact of an agreement on their interests to reduce the risk involved in the agreement, and put in place a procedure for changing it in response to future developments. For example, imagine that your counterparts are concerned that the civil society stakeholders do not have the capacity to follow through with implementation, and that because the government lacks direct control over their behavior, they might decide to implement the program in a way the government does not like. You and the government officials might agree to try a system that allows the civil society group to take a smaller role in implementation as a pilot project, for the first 6 months. After that trial period, the group as a whole will reconvene to review the progress and agree in advance that if the NGOs implementing the programme meet the agreed-upon criteria, their role would then be expanded. This contingent agreement allows the government to be assured of its interests in quality and oversight, and enables you to expand the role of civil society in the long run.

In order to analyze and make trade-offs that are advantageous for one's side, it is important for negotiators to be very well-prepared regarding their priorities amongst issues. In the Kyoto climate change negotiations, AOSIS anticipated that trade-offs would have to be made and designed its negotiation strategy accordingly. For example, the AOSIS representatives knew that there would not be consensus on their goal of a 20% reduction in emissions by 2005, but by figuring out what they could be flexible about and what *had* to be part of the final package, they were able to maximize the satisfaction of their interests. As a result, the final Kyoto Protocol met many of AOSIS's primary interests, and, most importantly, was legally binding and not voluntary. (The fact that almost every industrialized country was about to fail to meet its voluntary Framework Convention on Climate Change target of 1990 levels by 2000 had convinced AOSIS that voluntary commitments could not be counted on). In addition, while the final Kyoto target was lower than AOSIS sought, it might have been considerably weaker without AOSIS's advocacy of a much stronger target (see [Chap. 9](#)).

A *single-text approach* may be useful at this stage to manage the process of making trade-offs and moving the negotiation towards agreement, especially when dealing with a complex set of issues that will require organizational commitments and possibly legal, regulatory and/or policy change. The single-text approach involves centering deliberations on a single, jointly developed draft document, rather than discussing several draft texts at the same time. One strategy that is often effective is to ask countries that have no strong interests at stake in the negotiation, or whose interests are well-represented by other parties, to lead in drafting, allowing them to take on a quasi-mediation role. The single text may outline multiple options for each issue under discussion, placing provisions that are not yet agreed in brackets to be further discussed by the parties. The single text is critiqued—not accepted or rejected, either in part or whole—by the parties and then revised iteratively based on discussions until the draft cannot be improved

further. In other words, parties make no commitments until a full package, including trade-offs, is developed. The result is a unified framework document that reflects shared understandings and agreements within the group. In addition, the side-by-side presentation of multiple options in the document allows parties to consider many issues simultaneously. This facilitates trade-offs and encourages the creative mixing and matching of options within and across issues. By compiling agreed-upon and unresolved issues into a single text in this way, the parties can more effectively monitor their progress and avoid competing proposals.

As in many multilateral negotiations, the single-text approach was used in the FCTC negotiating process, where a major role of the chair of the Intergovernmental Negotiating Body was to prepare, issue and revise a “chair’s text.” In between sessions of the Intergovernmental Negotiating Body, the chair held consultations with delegations, both individually and in groups, to explore interests and possible options. This evolving document incorporated the various proposals for a convention into a single text that served as the basis for the negotiations. Towards the conclusion of the negotiation, as consensus emerged on key issues, a limited amount of bracketed text remained, and the friends of the chair (a small number of key stakeholders concerned about the issues in brackets) got together to make final trade-offs across issues to create a final text on which agreement could be reached.

3.2.3.2 Reaching Final Agreement: Modes of Decision-Making

A number of decision-making processes can be used to move to a final agreement, especially in multi-party negotiations. A successful negotiation is concluded by an agreement among participants, whether unanimous among all participants, or among a substantial number of participants capable of implementing what they have agreed. Unanimity may be desirable but is not always essential for success in a negotiation process. Moreover, while parties may strive for unanimity, it is risky to make unanimity the decision rule. Unanimity rules encourage “hold-outs.” With a unanimity rule, one or two stakeholders who are dissatisfied with a tentative agreement are able to block it and demand large concessions as the condition for their support. Instead, it may be better to allow parties to have recourse to some form of voting, such as support by a qualified majority (e.g., two-thirds) of participants. The World Health Assembly, the governing organ of the WHO, for example, has the authority under Article 19 of the WHO Constitution to adopt conventions or agreements within the competence of the WHO by a two-thirds vote.

Alternatively, consensus rules that do not require unanimity, such as “sufficient consensus,”¹⁰ and decision rules that allow stakeholders to opt out or abstain in

¹⁰ “Sufficient consensus” was used as a decision rule in the South African constitutional negotiations to end apartheid, in order to ensure that progress could be made amongst multiple parties with differing interests. The consensus required did not involve unanimity, nor an arithmetic counting of votes. Instead, it provided for a consensus that allowed the process to go on to the next stage and did not result in the breakdown of talks—effectively encouraging parties

order to not block progress, are advisable. In these cases, those who are dissatisfied with a tentative agreement should be allowed to state the reasons for their dissent, and other stakeholders should seek to find creative ways to meet the concerns of the dissenters. If solutions cannot ultimately be found that satisfy all stakeholders, those who cannot agree should have an opportunity to record their outstanding concerns, and other stakeholders may want to state the reasons why those concerns were not met in the final agreement. An innovative “opt out” procedure was used in the International Health Regulations to address potential obstacles to global action associated with the need for ratification of treaty obligations within signatory states. While many treaties require ratification at home—in effect “opting in”—the IHR entered into force at the time of their adoption by the World Health Assembly; WHO member states could “opt out” within a specific period of time if they later did not agree; rather than delay adoption of the agreement, the IHR allowed countries to opt out of certain provisions or submit reservations at a later date (World Health Organization 2005, Article 59).

Having cautioned about the risks of a unanimity rule, it is important to note that, when achieved, unanimity can send a very powerful signal and strengthen enforcement. For example, the significance of the FCTC has been enhanced by the unanimous adoption of the final text in 2003, following the likewise unanimous adoption of the initial resolution by the WHA in 1999.

In cases where the deliberating body is providing recommendations rather than making decisions, a final report might distinguish recommendations by their level of support (e.g., full consensus, super-majority and majority support). Alternatively, the issues in dispute can be referred to an independent individual or group that is regarded as competent and legitimate by all participants, and a nonbinding recommendation or binding decision sought on how to resolve the issues in dispute.¹¹

3.2.3.3 The Importance of Relationships of Trust

All negotiation processes create relationships. Past interactions influence the way a negotiation is conducted in the present. If one party has handled a past disagreement poorly and their negotiation partners feel they have been unduly pressured, it will be more difficult to establish a good working relationship, and the parties will experience difficulty reaching agreement in a current negotiation. In addition, stakeholders may fear that their goodwill offered during a negotiation could be used against them in the future.

Building (or rebuilding) trust is critical to success in most negotiations. Exploring interests, generating options and distributing value are all made easier

(Footnote 10 continued)

to withhold vetoes unless they felt so strongly about an issue that they would leave the negotiations (Mnookin 2003).

¹¹ See also an example of decision-making by consensus within the Organization for Security and Cooperation in Europe (OSCE) (Chigas 1996, p. 33).

by trust between the parties. Trust is also important when preserving the relationship is as crucial as meeting one's needs in a particular negotiation.

In the simplest terms, the best way to build trust is by demonstrating trustworthiness. For example, if a negotiator states that her government will increase the resources devoted to health surveillance as part of a short-term action plan, it is critical that the resources are in fact committed, and evidence brought to the negotiation table, so that the other negotiators can see that the commitment has been honored. Maintaining consistency between words and actions is one of the most important ways to build trust.

Box 3.9 In dealing with the USTR over pharmaceutical pricing, the Brazilian government adopted a multi-sectoral approach, consulting and involving leaders from a range of sectors within the country to define its policies and negotiation goals. The consultative process helped the government representatives to build trust with the leaders of key constituencies in Brazilian society, and to explore ways to align interests. Through consultation and trust-building, Brazil's negotiators were able to minimize tension between the key constituencies and the government negotiating team during the process (see [Chap. 8](#)).

3.2.4 Inclusion of Outside Stakeholders in the Process

Increasingly, the inter-sectoral nature of global public health issues means that a large number of stakeholders need to be at the negotiating table. Input from civil society groups, citizens and beneficiaries, and even industry, is often critical for ensuring that agreements reached are implementable. However, not all stakeholders need to have a place at the table. Stakeholder input may be gathered in a number of ways, including through public hearings, surveys, deliberative polling and citizen juries (Goodin and Dryzek 2006).

The FCTC process shows how a broad group of stakeholders can be effectively included in a transparent way. It openly aimed at encouraging the participation of actors who had been traditionally excluded from state-centric UN governance. In October 2000, the WHO held the first-ever, two-day public hearings that allowed interested groups to register their views prior to the intergovernmental negotiations. This process generated more than 500 written submissions and testimony by 144 organizations, ranging from transnational and state tobacco companies and producers to public health agencies, women's groups and academic institutions. The NGOs served a crucial educative function by organizing seminars and briefings for delegates on technical aspects pertinent to the proposed convention. They also engaged in extensive lobbying activities involving policy discussions with governments, letter-writing to delegates and heads of state, advocacy campaigns, press conferences before, during and after the meetings, and the publication of reports about tobacco industry practices and collusion in smuggling. By acting as the "public health conscience" during proceedings, NGOs became

effective advocates of tobacco control. They exposed the obstructionist and dangerous positions certain states took. For example, some organizations called for the U.S. to withdraw from the negotiations given the role of the U.S. delegation in obstructing tobacco control efforts. Some prominent tobacco control advocates were able to promote the public health agenda in the FCTC negotiations themselves as members of national delegations. Public health NGOs and advocates could thus successfully constitute a counterweight to pressures on national delegations by the tobacco industry (Collin et al. 2002). Similarly, during the IGWG, there were public hearings, and WHO Secretariat held a global web-based public hearing to obtain public input on the first draft from as wide a group of stakeholders as possible. Member states, national institutions, health profession organizations, NGO, academic institutions, and others submitted more than 90 contributions to the public hearings.¹²

3.2.5 Culture and Negotiation

Finally, it is important to note that global public health negotiations may also feature cross-cultural communication. Differences in languages, background and cultural norms for negotiation increase the risk of miscommunication. Norms for cross-cultural communication differ greatly as well.

Negotiators from some cultures tend to emphasize explicit communication and formal-process (so-called “low context” negotiation), while negotiators from other cultures tend to communicate more indirectly by using context and informal settings to develop understanding and agreement (“high context” negotiation). Either of these approaches may work well to achieve joint gains when used by all parties. Reaching agreement may be significantly more difficult with both “low context” and “high context” stakeholders at the table, if the negotiators’ lack of awareness of the differences leads to misunderstandings and tensions.

In the face of these challenges, some negotiators resort to a “cultural sensitivity” approach that focuses primarily on mastering cultural symbols and styles. They spend significant time preparing for a negotiation by learning the most important cultural norms and signals in order to ensure that their negotiating partners will not be offended or misunderstood. While it is important to note the cultural sensitivities of your negotiating partners, the cultural sensitivity approach

¹² See Contributions to the First Public Hearing, http://www.who.int/phi/public_hearings/first/en/index.html (accessed 2 December 2010); Contributions to the Second Public Hearing-Section 1, Draft Global Strategy and Plan of Action, http://www.who.int/phi/public_hearings/second/contributions_section1/en/index.html (accessed 2 December 2010); Contributions to the Second Public Hearing-Section 2, Proposals in Response to WHA 60.30, http://www.who.int/phi/public_hearings/second/contributions_section2/en/index.html (accessed 2 December 2010).

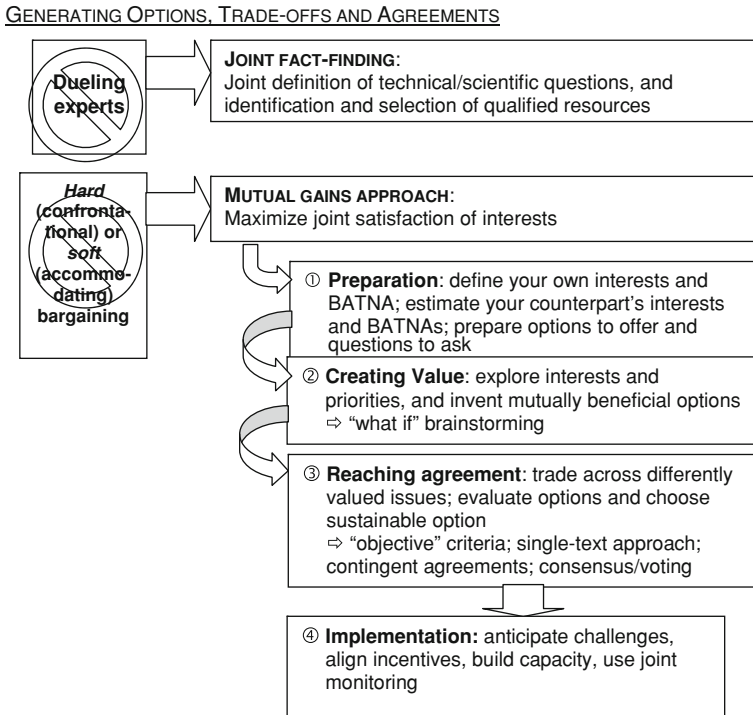


Fig. 3.3 Generating options, trade-offs and agreements

is not a negotiation strategy by itself—cultural awareness must not replace examination of the substance of the issues, the stakeholders’ interests and the search for mutually acceptable outcomes.

3.3 Conclusion

In global public health negotiations, the stakes are high for virtually all the parties, and the consequences of a failure to agree are in most cases too grave to be tolerable. Therefore, it is rarely acceptable to delay resolving the issues at hand and/or produce faulty outcomes by resorting to hard bargaining based on a different and irreconcilable reading of the facts. Joint fact-finding processes that build a firm foundation, followed by interest-oriented negotiation using the mutual gains approach and including input from all relevant stakeholders, offer the best chance of generating effective and sustainable health policies. Figure 3.3 summarizes these key negotiation elements.