Department of Justice Canada
Ministère de la Justice Canada

WORKING DOCUMENT

REGULATORY NEGOTIATION: ISSUES AND APPLICATIONS

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and
Bob Hann

March 1994

WD1994-4e

Research and Statistics Division/
Division de la recherche et
de la statistique

Policy Sector/
Secteur des politiques

Canada

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The present study was funded by the Research Section, Department of Justice Canada. The views expressed herein are solely those of the author and do not necessarily represent the views of the Department of Justice Canada.

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FOREWORDFOREWORD

This study was undertaken on behalf of the Department of Justice Canada, under the direction of the Dispute Resolution Project and in consultation with the Regulatory Compliance Project. Initiated in April 1992, the Dispute Resolution Project has the primary objective of developing policies relating to the use of alternative dispute resolution (ADR).

The purpose of this report is to present an overview of what regulatory negotiation is and how it may be instituted, and to discuss its potential application in Canada. The report combines a literature review with observations about regulatory negotiation gained from practitioners' experience in different regulatory sectors in Canada and other jurisdictions (i.e., United States and Australia; see Appendix B for a list of those interviewed). Specifically, the terms of the research were to document international experience with regulatory negotiation; identify issues, including benefits and limitations; discuss regulatory negotiation as a means of increasing compliance and reducing potential litigation; and examine its application in Canada. Areas requiring further work were also to be noted. Some equally important aspects of the reg neg process (e.g., negotiation techniques and requirements) have, of necessity, not been discussed in this report as their scope is beyond the project's terms of reference.

The report has been organized to make the concept of regulatory negotiation as easily accessible as possible. The first two chapters, written so that they may be read separately from the remaining chapters, provide a basic outline of what regulatory negotiation is, and how it is done. The third chapter re-examines the components of regulatory negotiation in light of experience gained by those who have used this procedure. The report ends with a chapter that reviews some of the major observations and suggests what the next steps ought to be.

The research for this report was done under contract with the Department of Justice and was greatly enhanced by the cooperation of a number of people who were willing to contribute their time and thoughts to this undertaking. We have attempted to do justice to the many constructive observations and insights that were provided; however, the views expressed in this report belong to the researcher alone and do not necessarily reflect those of the Department or those who provided their valuable assistance.

EXECUTIVE SUMMARYEXECUTIVE SUMMARY

This report was undertaken under the auspices of the Dispute Resolution Project of the Department of Justice Canada. The research combined a literature review of regulatory negotiation (reg neg) and more conventional rulemaking processes in Canada and other jurisdictions (notably, the United States and Australia) with interviews with spokespersons who have had experience with the regulatory negotiation process.

Developed in the 1980s in the United States, regulatory negotiation represents an innovative and compelling alternative to conventional methods of drafting regulations. The following points summarize the major characteristics of regulatory negotiation:

- Regulatory negotiation is a type of alternative dispute resolution (ADR) technique in which no third party plays a significant role in the determination of outcome.

- Regulatory negotiation is not to be confused with negotiated settlement. While both involve negotiation, regulatory negotiation is prospective in its orientation; its purpose is not so much to resolve specific disputes as it is to establish general rules that will influence behaviour.

- Regulatory negotiation is intended as a supplement and alternative to conventional methods of rulemaking such as consultation and hearings.

- Regulatory negotiation has four critical features:

  - it occurs at the "front end" of the development of regulations;

  - stakeholders meet face-to-face to present their positions and hear others' viewpoints;

  - decisionmaking with respect to the final draft of the proposed regulation is based on consensus; and

  - decisions reached through the negotiations are, as far as possible, binding.

- "Consensus" in the context of regulatory negotiation means that each interest represented at the table concurs in (or at least does not oppose) the resulting agreement.

- The purpose of regulatory negotiation is to produce better regulation “politically, procedurally and substantively” by providing a means whereby parties with significant interests in a proposed regulation may have an opportunity to participate in the formulation of the regulation.

- The benefits of regulatory negotiation include:

  - an improved basis for regulatory decisionmaking and improved regulations;

- less litigation, earlier implementation and greater compliance;
- enhanced political validity of regulatory decisionmaking;
- more cooperative relationships among interests and the agency; and
- reduced time, money and effort.

- The drawbacks of regulatory negotiation are that:
  - it tends to be resource-intensive in the short term and requires adjustment in agencies' internal procedures;
  - it requires a substantial investment of time and resources on the part of public-interest groups, who may have a limited capacity to sustain the effort required to participate in the process - particularly if these groups are involved in more than one negotiation;
  - because of its unfamiliarity to many stakeholders, it may have to overcome negative attitudes about what is involved in the process, including agency resistance to the idea;
  - it risks failing to represent the public interest; and
  - it is subject to manipulation by those who may be motivated to use the process for their own private goals.
- The procedures involved in regulatory negotiation involve four stages:
  - an assessment stage, entailing a careful evaluation of the appropriateness of using regulatory negotiation on the basis of the criteria that have been developed for the process: the nature of the subject matter being regulated; the number and nature of the issues involved; the time frame available for the development of the regulation; and the identification, availability and commitment of the affected interests;
  - a pre-negotiation stage, entailing two convening phases: first, a convenor conducts a more in-depth assessment of the above criteria and prepares the parties for the negotiations; in the second phase, the agency and the convenor arrange publication of the notice of intent to negotiate, select a mediator and make any adjustments arising from the notice;
  - a third stage, entailing the actual negotiations, including both procedural and substantive negotiations; and
  - a fourth stage, involving closure and follow-up (e.g., assessment of the process and monitoring of the implementation of the agreement).

While regulatory negotiation may not be appropriate in every rulemaking situation, it constitutes a means of developing regulations that may be preferred when there are significant interests, sufficient issues available for negotiation, and adequate motivation for negotiations to take place in good faith. The style of negotiation used within the reg neg process is, in Roger Fisher's terms, "principled negotiation" - that is, negotiation that is focused on mutual problem-solving.

Participation in regulatory negotiation must be voluntary and participants must feel motivated to engage in this approach. For non-government stakeholders, motivation is determined in relation to their "best alternatives to a negotiated agreement" (BATNAs). If stakeholders perceive that their goals are better served by not negotiating the regulations but by pursuing other means (such as lobbying, litigating, stalling for time), they will be unlikely to participate in regulatory negotiation.

BATNAs may be influenced in favour of negotiation. Thus, if the government makes its "fallback" position clear, or if it discourages other means such as lobbying before regulatory negotiation has been tried, there is a greater likelihood that stakeholders will want to participate in regulatory negotiation. It has been hypothesized, therefore, that regulatory negotiation is more likely to be successful if the parties agree on what the outcome will be in the absence of negotiations; the parties disagree on what the outcome will be in the absence of negotiations and all are pessimistic rather than optimistic; and the regulatory agency or ministry actively influences parties' perceptions of BATNAs, emphasizing to each party the undesirable consequences of unilateral agency action in terms relevant to each party, thereby making the prospect of negotiation more attractive.

Government participation may also need to be encouraged, because there is likely to be some resistance to regulatory negotiation based on a number of factors such as lack of information about, and familiarity with, the process; uncertainty about its legitimacy; and the need to undertake a number of internal changes to accommodate the procedure. A number of steps could be taken to encourage government participation in regulatory negotiation, including legitimizing the process through enabling legislation.

Arguments in favour of a reg neg statute include the views that legislation would provide both legitimacy to the process and formal encouragement for its use, clarify procedural law questions, formalize agencies' authority for using regulatory negotiation, and provide guidance about how to proceed. Arguments against reg neg legislation claim that it could reduce flexibility, upset the consensual balance required for regulatory negotiations, and prematurely codify the process.

The reg neg process, although developed for the formulation of regulations, is amenable to a number of other applications including creating policy, setting standards, settling post-regulatory disputes, permitting and licensing, and ensuring compliance with regulations. The benefits of using the process in other applications are similar to those attributed to the development of regulations; however, as in the negotiation of regulations, care must be taken to select appropriate situations in which to use the procedure.

At this stage in Canada, the use of regulatory negotiation might be assisted by the

following recommendations:

Recommendation 1

The Department of Justice should provide a series of workshops or seminars on regulatory negotiation for senior officials in regulatory agencies and departments. These workshops should include speakers who have had working experience with the regulatory negotiation process.

Recommendation 2

The Department of Justice, through its Dispute Resolution Project and in conjunction with the Regulatory Compliance Project, should consult with regulatory departments to find two or three appropriate situations in which regulatory negotiation could be undertaken.

Recommendation 3

In conjunction with the foregoing pilot projects on regulatory negotiation, the Department of Justice should consult with regulatory departments to determine possible candidates for case studies of conventional methods of formulating regulations.

Recommendation 4

An evaluation of the quality and usefulness of regulatory impact analysis statements should be undertaken, including recommendations for improvements, if required.

Recommendation 5

Consideration should be given to the creation of an agency equivalent to the Administrative Conference of the United States (ACUS) or to other means of providing the benefits derived from ACUS.

Recommendation 6

The Department of Justice, in conjunction with the Regulatory Affairs Secretariat and other relevant departments and organizations, should examine ways to provide funding and training for regulatory negotiation.

Recommendation 7

The Department of Justice, in consultation with regulatory agencies and ministries, should explore further means of encouraging the use of regulatory negotiation.

Recommendation 8

The Department of Justice should organize workshops to canvass opinion and discuss the advantages and disadvantages of reg neg legislation, its content and orientation, and/or alternative methods of providing legitimacy for regulatory negotiation.

Recommendation 9

The Department of Justice should assume a leadership role in the development of regulatory negotiation in Canadian jurisdictions. Activities undertaken by the Department in this regard might include:

- regular dialogue workshops on the subject of regulatory negotiation, with focused workshops on areas of particular interest or concern to federal and provincial regulatory officials and other relevant groups (e.g., the Canadian provincial and national Round Tables, third-party neutrals, business and industry representatives, public-interest groups, representatives from universities and other accreditation institutions);

- the dissemination of information on regulatory negotiation, including findings that may emerge from any of the foregoing suggested studies and evaluations; and

- guidance with respect to the application of the reg neg process in contexts other than rulemaking.

1.0 REGULATORY NEGOTIATION

1.1 Introduction

Before discussing the nature of regulatory negotiation (reg neg), it may be useful to present a few observations about what regulatory negotiation is not. Regulatory negotiation is a procedure that is customarily grouped with other techniques known as alternative dispute resolution (ADR). Included within ADR are mini-trials, fact-finding, arbitration, mediation and conciliation.[1] [2] Unlike these methods, negotiation is a process in which no third party plays a significant part. Rather, in its ideal form, it involves joint decisionmaking by equal participants.[3] With respect to the subject matter of this report, the decisionmaking concerns regulations.[4]

With this in mind, it is also important to note that regulatory negotiation is not the same as negotiated settlement such as occurs in a mini-trial or in procedures used to settle challenges to a regulation, or in disputes over, for example, the environmental consequences of particular actions. Negotiated settlements in the regulatory sphere occur when a dispute that might otherwise be taken before a judge or tribunal, is referred for settlement outside a formal hearing. Some of these disputes are handled either through negotiated settlement, mediation or arbitration.[5]

Regulatory negotiation, on the other hand, differs from negotiated settlements in two major respects. Firstly, the controversies that regulatory negotiation aims to resolve extend beyond particular applications: they have broad policy applicability. Secondly, regulatory negotiation is *prospective* in its orientation; its purpose is not so much to resolve specific disputes as it is to define general rules that will influence behaviour later. In both respects, regulatory negotiation is more like the legislative than the judicial

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[1] Negotiation is not to be confused with arbitration or mediation. "Arbitration" is similar to adjudication not only in the sense that it, like adjudication, occurs *after* the promulgation of regulations, but also because it involves a third party to resolve disputes among parties. It differs from adjudication in that the third party's authority stems from a specific agreement and is only for the particular purpose at hand. Arbitration is commonly used in commercial transactions and labour relations. "Mediation" (sometimes called "conciliation") also involves activity by a third party, but in this case, she or he is neither a judge nor an umpire, nor does the mediator have the authority to impose a decision. Instead, the mediator may only propose to the parties the terms of possible agreements by which they might resolve the dispute. Like arbitration, mediation has many styles. In some instances the mediator may take a very proactive role approaching that of a judge or arbitrator; at the other extreme, especially where the mediator is a collectivity (e.g., as in many North American aboriginal cultures), its members may be almost indistinguishable from agents of the respective parties, and so the process may verge on negotiation. *See* Woodman 1991:12-13 and Ontario, Round Table 1992a:5-7.

[2] The recent report of the Law Society of Upper Canada's Dispute Resolution Subcommittee (1993:2) maintains that ". . . the use of the word "Alternative" perpetuated the tendency to think of all other methods of dispute resolution, other than litigation, as of secondary importance and perhaps optional. The Subcommittee wishes to promote an understanding of dispute resolution in which litigation is seen as one among a range of options available to every lawyer." It is also interesting to note that it has been pointed out that ADR should more properly stand for "Additional Dispute Resolution" in the sense that nothing can be alternative to the sovereign authority of the judicial system. (*See* Street 1992:194).

[3] Also unlike mediation, it has been observed that negotiation is directed towards decisionmaking, whereas mediation most commonly involves reaching a settlement.

[4] Subsequent sections of this report discuss the use of the "regulatory negotiation *process*" for applications other than rulemaking, such as the development of policy or standards. Properly speaking, what is meant by this is simply the use of negotiation to develop either policy or standards, but because of the widespread currency of the phrase, "regulatory negotiation" (especially in the American literature), the term has been appropriated to cover a variety of applications.

[5] *See* Harter 1982:36ff for a discussion of some American examples of negotiated settlements.

process as a framework for making regulatory policy.[6]

While both negotiated settlements and regulatory negotiations entail a process of bargaining and trade-offs, and may often (like other ADR remedies) involve participants with ongoing relationships, negotiated settlements more often appear in the context of what has been called "conflict of interests", whereas regulatory negotiation has more in common with a "conflict of values".[7] Nevertheless, the criteria used for implementing negotiated settlements and regulatory negotiation are often similar, and many of the observations made about negotiated settlements apply equally to regulatory negotiation.[8]

The fact that regulatory negotiation is considered to be an alternative dispute resolution technique raises the question: Alternative to what? Answers to this vary, depending on the jurisdiction. In the United States, for example, where a high proportion of regulations are challenged in court, a common answer would be that it is an alternative to rulemaking by adjudication, although it is also, of course, an alternative to American notice-and-comment and hybrid rulemaking.[9] In Canada, where there are very few challenges to regulations, regulatory negotiation is more likely to be viewed as an alternative to what has been called "black box regulation"[10] ; although it may also be an alternative to subsequent litigation (e.g., a challenge under the *Canadian Charter of Rights and Freedoms*), albeit to a lesser degree than in the United States.[11] It is in

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[6] Fiorino 1988:764.

[7] For example, Gulliver (1973:682) observes that ". . . a conflict of interest occurs where two parties want the same resource but there is not enough for both. Values, in this context, are not contested, for the common desire for the same thing predicates a common evaluation of it, whether it be money, land, or honour. A conflict of values occurs where the two parties disagree specifically on the evaluation of some resource, of some right or obligation, over a norm or rule, and also over what in fact happened in some situation and how that should be interpreted." *See* also Menkel-Meadow 1984 and cf. Perritt 1987:606ff.

[8] *See* Section 3.6, Other Applications of the Reg Neg Process, in Chapter 3.0 *infra*.

[9] *See* Olpin et al. 1987. Also, conversation with Mr. Chris Kirtz, the United States Environmental Protection Agency, April 7, 1993. In the United States, rulemaking is governed by procedures stipulated in the *Administrative Procedure Act* (APA). The informal procedures involve a "notice-and-comment" method of developing regulations (somewhat similar to Canadian methods) involving the following steps. The regulatory agency gathers data from various sources and may have informal meetings with interested or affected groups to seek information and test ideas. The agency then decides on the content of a proposed rule and publishes it in the Federal Register. All interested parties may submit written comments, and in addition, the agency may hold public hearings. After reviewing the comments and any testimony presented at hearings, the agency must prepare and publish a final rule, which usually takes several months and may at times take considerably longer. There are a number of exceptions to the foregoing procedures relating to rules about military or foreign affairs matters, or to rules about agency internal management. These procedures also do not apply to those rules that are explicitly required by statute to follow the more formal procedures stipulated by the APA, which are referred to as "on-the-record" procedures or "hybrid rulemaking", or to interpretive rules, general statements of policy, or rules of agency, organization, procedure or practice. Apart from these exceptions, the majority of rules follow the notice-and-comment procedures described above. However, the point of interest for regulatory negotiation is that many rules end up being challenged in court; for example, the United States Environmental Protection Agency (EPA) has had more than 80 percent of its rules challenged in court.

[10] Conversations with Mr. Lee Doney, Executive Director of the British Columbia Round Table, April 13, 1993, and Mr. Mike Kelly, Executive Director of Clean Air Strategy of Alberta (CASA), April 7, 1993. Basically, the term "black box regulation" refers to the idea that the government consults to an unknown degree and then on the basis of unknown information issues a regulation without providing the background reasons (the provision of regulatory impact analysis statements (RIAS) notwithstanding). *See* comments regarding RIAS, p. 117, *infra*.

[11] The conventional procedure for creating regulations in Canada involves a pre-proposal planning stage (which may include consultation with other federal departments and the public); drafting of the proposed regulation and the related Regulatory Impact Analysis Statement (RIAS); submission of the proposed regulation and supporting documentation to the Regulatory Affairs Secretariat (Treasury Board); review and approval of the RIAS (and the communication plan) by Regulatory Affairs; review and approval of the proposed regulation by the Privy Council Office Section of the Department of Justice; submission of the proposed regulation and supporting documentation to the Minister of State for Privatization and Regulatory Affairs for approval for prepublication by Special Committee of Council (SCC); publication of the proposed regulation and the RIAS in the *Canada Gazette, Part I*, as part of the public consultation process, followed by revision to and finalization of the texts of the proposed regulation and RIAS to reflect comments received; submission of the proposed final text of the regulation and supporting documentation to the Minister of State for Privatization and Regulatory Affairs for final approval by the Special Committee of Council; registration of the regulation and publication of it and the RIAS in the *Canada Gazette, Part II*; review of the regulation by the Standing Joint Committee for the Scrutiny of Regulations; and cyclical review and evaluation of all existing federal regulatory programs under the guidance of the Office of the Comptroller General.

relation to conventional rulemaking methods in Canada that one frequently hears that regulatory negotiation represents "consensus decisionmaking" in contrast to conventional methods, which represent "command decisionmaking".[12]

The foregoing points have been made in order to set the stage for the following description of regulatory negotiation while leaving more detailed discussion of some of the issues raised in these distinctions to later sections of this report. It is important to note, however, that there are differences between the premises for the use of regulatory negotiation in the United States and in Canada. As the British Columbia Round Table (Volume 2, 1991:11) report observes:

> . . . the litigious history of regulation-making in the United States, which stimulated the search for alternative ways to setting rules, is largely absent in Canada. The United States courts have traditionally taken a strongly interventionist role in regulatory matters, compared to Canada. By comparison, both federal and provincial executive (cabinet) levels in Canada have greater freedom to act, and are significantly less constrained by the courts and legislatures than in the United States. In addition, legislation in the United States calling for regulations tends to be more explicit as to their need and content than similar legislation in Canada. This legislative commitment tends to remove any question regarding whether there will be a regulation; the debate focuses instead on what the regulation will contain and how it will be administered. Furthermore, public and legislative debate of regulations tends to be more rigorous in the United States, where it plays a critical role in defining issues, informing the public, mobilizing stakeholders and identifying interests and representatives who would participate in the reg-neg process . . . .
>
> As a consequence, there may be less legislative imperative and litigious motivation in Canada than in the United States to introduce a collaborative approach to regulation setting. However, there is sufficient dissention over regulations at political levels in Canada to justify trying a reg-neg approach. In British Columbia, it is desirable to avoid the type of adversarial rule-making that led to the litigious history of the United States: to find a "better way" of developing regulations and standards that is applicable to the British Columbia experience.

While there may be "less legislative imperative and litigious motivation in Canada" for the use of regulatory negotiation, findings from this study suggest, as the British Columbia report also notes, that there is a strong political motivation. Moreover, the fact that in Canada it is much more difficult to challenge and revise regulations once they have been enacted gives rise to the suggestion that there is even greater reason to

[12] This is not to deny that consultation has been a principle in Canada's Regulatory Reform Strategy. However, as Craven (1991), among others, points out, compliance with this principle is less than certain. *See* the section, Political Validity, *infra*.

consider a consensus process at the front end of regulatory decisionmaking. In this section of the report, however, these differences are not directly material to a description of the fundamental characteristics of the regulatory negotiation process. The purpose of the remainder of this chapter is to present a description of regulatory negotiation in conceptual terms.

1.2 What is Regulatory Negotiation?

Regulatory negotiation is a process whereby parties with significant interests in a regulatory matter are brought together to develop a proposal for the regulation. It is a process that emerged in the 1980s as an alternative to conventional procedures for developing regulations. "Regulatory negotiation", and "reg neg", are terms that originated in the United States and more recently have been referred to as negotiated rulemaking. In Canada, the process is sometimes referred to as "the development of regulations through consensus decisionmaking". The differences in terminology may reflect some differences between American and Canadian administrative law and different orientations towards regulatory activities; subsequent sections of this report review these differences. In this report we are using the term regulatory negotiation, or reg neg, because of its simplicity and familiarity to most readers.

There are several critical features of regulatory negotiation:

- Regulatory negotiation occurs at the "front end" of the development of regulations.
- Stakeholders meet face-to-face to present their positions and hear others' viewpoints.
- Decisionmaking with respect to the final draft of the proposed regulation is based on consensus.
- Decisions reached through the negotiations are, as far as possible, binding.

1.2.1 Reg Neg Occurs at the "Front End"

Regulatory negotiation can be initiated either by private-sector stakeholders who have substantial interests in a proposed regulation, or the regulating authority, although it is more common for the latter to institute the procedure. Regulatory negotiation occurs before the ministry or agency[13] drafts its regulation. It is intended to replace, where

[13] A note here about terminology may be appropriate. There appears to be a convention in Canadian literature wherein the term "agency" refers to quasi-independent bodies or administrative boards such as the Canadian Radio-television and Telecommunications Commission (CRTC), while the term "ministry" refers to the more conventional government ministry or department. It is not clear, however, whether the American literature follows this convention; most of the American literature simply uses the term "agency". As it would be awkward in this report to repeatedly use the phrase, "ministry/department or agency", the term "agency" is simply used in many instances. It is interesting to note in this regard, however, that Northey (1991:175) claims that "[G]overnments created administrative boards because they thought these boards could distinguish between political and expert decisionmaking. Where a decision was said to require mostly scientific expertise, whether the expertise was in social science or pure science, then it appeared best to delegate the matter to a board. However, where a decision involved

appropriate,[14] conventional procedures whereby the regulatory agency drafts the regulation before giving notice of its content by publishing it in *The Canada Gazette, Part I*, and then receives comments on the regulation from the public (what is called in the American literature, the notice-and-comment process).[15] Thus, regulatory negotiation takes place before the ministry or agency more or less commits itself to a particular regulation during the drafting stage.[16] Also, unlike conventional consultative practices, regulatory negotiation is not a means of canvassing opinion about proposed regulation and then revising the regulation on the basis of unilateral information-gathering, but is a procedure that *precedes* the issuance of the notice and the opportunity for the public to comment on a proposed regulation.[17] The proposed text of the regulation is therefore placed in the hands of the negotiating stakeholders (of whom the regulatory authority may be one stakeholder) and is not simply the creation of the regulatory ministry or agency.

1.2.2 Face-to-face Meeting of Stakeholders

Apart from regulatory negotiation, there are few formal provisions for stakeholders to meet as a group and with government authorities to communicate their respective views so that each may react *directly* to the concerns and positions of the others in an effort to resolve or accommodate conflicts. Owing to the direct involvement of stakeholders, regulatory negotiation is considered to have advantages over government consultation with interest groups, which may often be uneven[18] and which, no matter how conscientiously undertaken, does not permit interest groups to confront and to exchange information about their respective positions. It has been claimed in this regard that regulatory negotiation is "directed towards problem-solving rather than being program-driven."[19]

It has been observed that owing to the fact that the complexity of government regulation has increased greatly in the last few decades, the need for information-sharing and discussion of issues has become increasingly important. Regulatory negotiation is considered an alternative means of providing a forum whereby stakeholders may present

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political interest balancing, then it appeared best to leave the decision-maker political. Experience has shown that where expert decision-makers have been used for political decisionmaking, the phenomenon of agency capture appears. Agency capture exists when a public regulatory body ceases to regulate for the public interest, and instead regulates for the benefit of the interests under regulation." *Cf.* Salter 1982 who claims that a distinction between "expert" and "political" decisionmaking is illusionary because in regulatory decisionmaking both types of decisionmaking occur together.

[14] It is important to note that regulatory negotiation is recommended as a *supplement* to regulatory agencies' conventional methods, for it is recognized that the negotiation process may not be appropriate for all situations.

[15] *See* note **Error! Bookmark not defined.**.

[16] *See* Zoll 1988:10.

[17] Administrative Conference of the United States *Sourcebook* 1992:792. Procedures requiring notice-and-comment are then followed after the regulation has been drafted by the negotiating committee. Zoll (*Ibid.*) observes that negotiation often diminishes the amount of comment received after notice and can reduce last-minute surprises.

[18] The customary practice has jokingly been referred to as following the "Casablanca Rule": i.e., "round up all the usual suspects." Craven (1990:265) observes that "too often, an authority will have an established group of `clients' corporations, trade unions, pressure groups, etc. with whom it will be only too eager to consult. The problem is ensuring that consultation goes beyond these favoured groups and into the wider public." *See* also note **Error! Bookmark not defined.**.

[19] Conversation with Mr. Glenn Sigurdson, April 6, 1993. It has also been observed that, apparently unlike present government practices, one of the key functions of the generation and sharing of information is, in addition to advising ministers about the regulatory options, to advise the public as well (*see* Hartle and Trebilcock 1982:677).

their positions and the evidence behind their positions, hear others' positions and reasons, review and rank priorities, and, through a process of compromise and trade-offs, arrive at a mutually acceptable decision about the text of a proposed regulation.

As subsequent sections discuss, the validity and effectiveness of such face-to-face meetings require two conditions: that *all* significant stakeholders be present at the negotiations,[20] and that a sufficient number of issues be available for consideration and negotiation. Occasionally, a situation may arise in which, because of the acrimonious relationship between two or more parties, the parties do not meet face-to-face; instead, their positions are transmitted among the parties by the third-party neutral or professional negotiator/facilitator. This process is nevertheless considered to be an effective form of negotiation.[21]

1.2.3 Decisionmaking via Consensus

One of the critical aspects of negotiation is that decisions are arrived at through consensus.[22] The definition of "consensus" is something all members of the negotiating group must agree upon at the outset. Harter (1986:58) points out that the definition of consensus that has proved the most workable is that each *interest* represented in the negotiations concurs in (or at least does not oppose) the result. According to Harter, this definition has several important consequences:

> First, no party can be outvoted; hence, each preserves whatever power it has. This has proved critical to most parties' willingness to participate in regulatory negotiations. Second, it forces the parties to come together to solve a mutual problem : developing the rule. They can no longer act as a group of disparate interests, each of which can dissent from a provision, go back home, and tell their constituents how tough they were. Rather, all participants must decide whether, on the whole, they are better off accepting the agreement or trusting their fate to another process. Third, it means that individual members of an interest group may dissent without destroying the consensus, so long as the interest as a whole concurs.

Consensus is distinguished from "majority rule":[23] consensus entails unanimity. As the British Columbia Round Table report (Volume 2, 1991) points out: "In effect, each participant has a veto, or the ability to prevent a given outcome. This aspect of negotiation, while often viewed as impractical or unreasonable, is considered to be essential to the process in order to give all participants equal influence over a decision. Thus, rather than being concerned about “how many are on their side”, participants are motivated to consider areas of accommodation, to seek solutions that meet the interests of

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[20] For a discussion of how to select all relevant stakeholders, see the section, Private-sector Participation, *infra.*

[21] Conversation with Judge Barry Stewart, May 11, 1993.

[22] *See* Recommendation 82-4, 1 CFR 305.82-4 in Administrative Conference of the United States *Sourcebook* 1990:11-14.

[23] It does not usually mean "majority rule" unless, of course, the negotiating committee chooses to define it this way.

the other parties as well as their own, and to search for innovative solutions in order to reach closure."[24] In its account of consensus decisionmaking, the Canadian Round Table (1993:3) states that:

> In a consensus process, the participants work together to design a process that maximizes their ability to resolve their differences. Although they may not agree with all aspects of the agreement, consensus is reached if all participants are willing to live with "the total package".
>
> Consensus processes encourage creative and innovative solutions to complex problems by bringing a diversity of knowledge and expertise together to resolve issues. When used in appropriate situations, consensus processes reward expenditures in time and effort by generating creative and lasting solutions to complex problems.

The British Columbia Round Table report also points out that consensus decisionmaking via negotiation differs from the conventional approach of public consultation in that "too often, such consultation does not occur until after objectives have been established, options identified and choices determined by the government".[25]

It has been observed that occasionally the participants may be unable to reach a consensus on a proposed rule, and in that event they should identify in the report submitted to the regulatory department or ministry both the areas in which they are agreed and the areas in which consensus could not be reached. This could serve to narrow the issues in dispute, identify information necessary to resolve issues, rank priorities and identify potentially acceptable solutions.[26]

The British Columbia Round Table 1991 report observes in this regard that, like any other process, consensus-based decisionmaking can fail (and at times, should fail); in such an event, participants will have recourse to alternatives for making decisions, including administrative, legal and political forums. As suggested earlier, a common fallback is that a government authority will decide the matter. A frequent suggestion is that negotiating parties should know at the outset of their negotiations what the government's fallback position will be (i.e., what the proposed regulation will be in lieu of a consensus agreement). Often, knowing the government's fallback position may act as an incentive to reach consensus, in the sense that stakeholders prefer to arrive at a solution themselves rather than rely on alternative means of resolution over which they have less control, and an alternative outcome.[27]

1.2.4 The Decision Reached Should Be Binding

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[24] British Columbia, Round Table report (Volume 1, 1991:2). The report goes on to quote Fraser (1991) on this topic: "For some people, achieving consensus is a means for balancing the pressure of powerful special interests with a method to ensure that weaker advocates have fair opportunity to influence results. For others, consensus-seeking is presented as a way to ensure that agreements when implemented are capable of standing the test of time."

[25] *Ibid.* As mentioned earlier, this is what is usually meant by "program-driven" decisionmaking.

[26] United States Administrative Conference recommendation 84-2, *loc. cit.*

[27] *See* the section on BATNAs, *infra*.

If participants have little reason to believe that their decisions will be carried through, they will not be able to negotiate in good faith; and the risk is that they will use the process for ulterior reasons; for example, as an occasion to establish for the record their entrenched positions rather than seek solutions to problems and disagreements, or to purchase a time delay. Accordingly, there must be a high degree of certainty that the consensus reached will be respected and implemented.[28] This point has implications for the roles and responsibilities of all the participants. It has been pointed out in this regard that the representatives of interest groups (including the ministry or agency) must be senior enough and have sufficient authority to bind the organizations that they represent (Ontario Round Table, 1992a:8).

The Ontario Round Table (1992a) report recommends that to minimize the regulatory enforcement role of the government, Ontario should consider a negotiated rulemaking program similar to that practised in the United States. Under negotiated regulation, implicated private parties negotiate the terms of a regulation with the government with the understanding that parties to the agreement are bound not to litigate or lobby against the terms that implement that agreement.

Similarly, the British Columbia Round Table (Volume 2, 1991:3) report, in its discussion of the key components of a consensus process, states that "[G]overnment must be committed to responding to the outcome of the process in a timely fashion.[29] Parties to the process must be reasonably satisfied from the outset that their agreement has a reasonable prospect of being implemented.[30] If government cannot act on the agreement, it must be obliged to provide clear reasons to the parties involved. (This would be an unlikely outcome if government representatives are involved in the process.)"[31]

The Canadian Round Table report (1993:11), in its "Guiding Principles of Consensus Processes" also states:

> *Principle #10:* Any agreement reached in a consensus process must include a commitment among all participants to implementation and effective monitoring of the agreement.
>
> From the beginning, parties must be satisfied that their agreements will be implemented. As a result, all parties should discuss the goals of the process and how results will be handled. Clarifying a commitment to implementing the outcome of the process is essential.

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[28] *See* the British Columbia Round Table report (Volume 1, 1991:15) and Osherenko 1989:14, 16-18.

[29] It is noted that in the United States, a court decision ruled that the agreement reached was binding when the agency failed to respond to the proposed agreement within 60 days. Administrative Conference of the United States *Sourcebook* 1990:32.

[30] The importance of agency commitment was emphasized by several of the spokespersons interviewed for this study.

[31] Harter (1986:58) comments in this regard: "The agency agrees to use the consensus proposal as the notice of proposed rulemaking unless it is outside the agency's authority or something is significantly wrong with it. That should happen rarely, however, since presumably the senior agency official has signed off on it, and he or she should have done his or her homework to ensure that no other relevant agency officials had problems with the proposal as it was developing and before its adoption."

> The support and commitment, particularly of governing agencies responsible for follow-up is critical. When decisions require government action, the participation of government authorities from the outset is crucial.
>
> A post-agreement mechanism should be established to monitor implementation of the agreement and deal with problems that may arise.[32]

It is recognized, of course, that decisions reached through collaboration cannot be more than advisory: they do not replace the delegated authority of the regulatory ministry or agency. It remains the responsibility of the government to ensure that recommendations are consistent with laws and public policy. Nevertheless, if the recommendations satisfy these considerations, there ought to be strong assurances that the government will support the proposed regulation.[33]

1.3 The Purpose of Regulatory Negotiation

The purpose of regulatory negotiation is to provide a means whereby parties with significant interests in the consequences of proposed regulation may have an opportunity to participate in the formulation of the regulation. For their participation to be meaningful, it is important that any decisions reached should be based on consensus, so that those with potentially greater leverage may not overwhelm other participants.

The purpose of allowing participation by relevant stakeholders is to produce, it is claimed, better regulation: politically, procedurally and substantively. With respect to the political merits of this strategy, it has been pointed out that public participation is fundamental to ideals of democracy and the rights of citizens in a democratic society.[34] It

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[32] Hoffman (1990:42), for example, refers to the situation that arose with respect to negotiation of the Workplace Hazardous Materials Information System (WHMIS) amendment to the *Hazardous Products Act* which appears to have suffered some frustration at the stage of implementation.

[33] As is discussed further below, this is one reason why it is important to have a representative from the regulatory agency participating in the negotiations. Some examples of agreements used by agencies are:

> The FAA would issue the proposed rule as prepared by the committee unless the agency finds that it is inconsistent with the statutory authority of the agency or other statutory requirements or it is not appropriately justified. In that event, the agency would explain its reasons for its decision. If the agency wishes to modify the negotiated proposal, it would do so in a way that allows the public to distinguish its modifications from what the group proposed.
>
> The agency intends to use any consensus that is justified and within its statutory authority as the basis of the proposal.
>
> The [Federal Trade Commission] agrees, absent extraordinary circumstances and subject to statutory requirements, to incorporate the committee's consensus recommendations in an NPRM [Notice of Proposed Rulemaking] initiated a proceeding to amend rule 703. (*See* Administrative Conference of the United States, *Sourcebook* 1990:51.)

[34] *See*, for example, the *Citizens' Code of Regulatory Fairness* and, to a lesser extent, the "Guiding Principles of Regulatory Action" contained in the *Regulatory Reform Strategy* (1987). *See* also Harter (1982:7): "A regulation that is developed by and has the support of the respective interests would have a political legitimacy that regulations developed under any other process arguably lack." The introduction to an article by Jackman (1990) in which she refers to an essay by Charles Taylor (1985) is also particularly apt in this context: "In an insightful essay on the sources of identity and alienation in late 20th century Canada, Charles Taylor describes two alternate models of contemporary society in the following terms:

> In one model, the dignity of the free individual resides in the fact that he has rights which he can make efficacious if necessary even against the process of collective decisionmaking of the society, against the majority will, or the prevailing consensus . . . . In the other model, his freedom and efficacy reside in his ability to participate in the process of majority decisionmaking, in having a recognized voice in establishing the `general will'."

is also consistent with notions of justice, in the sense that allowing stakeholders participation in establishing the factual and normative basis for regulatory policy enhances their perceptions that they have been treated fairly. Thirdly, with respect to the substantive merits of the process, it is claimed that decisions reached via this method will be of a better quality insofar as they are informed by a broader range and a potentially higher calibre of information.[35]

Regulatory negotiation is a procedure intended primarily for the drafting of regulations; however, the same process has been useful in other contexts, including developing policy, setting standards and resolving disputes at the post-regulation stage.[36] Nonetheless, regulatory negotiation is primarily a tool for drafting regulations and in this regard it is interesting to note that after its early applications in the United States, the Administrative Conference of the United States (ACUS) recommended that the term ought to be changed to "negotiated rulemaking" to emphasize that it is addressing negotiation of *rules*, and not other uses of negotiation in the regulatory process.[37] In this report, however, the term "regulatory negotiation" is used because it may be inappropriate to create too strong an identification with the American application.[38]

1.4 Benefits and Drawbacks

1.4.1 Benefits

One of the best summaries of the merits of regulatory negotiation is provided by the Administrative Conference of the United States (ACUS) *Sourcebook on Negotiated Rulemaking* (1990:173):

> In traditional rulemaking, much energy, time and other resources are expended by the agency, the regulated community, and the public on unilateral activities directed toward achieving divergent goals. Negotiated rulemaking restructures the process so as to channel the energy and resources toward cooperative problem-solving, so that the result will be a better, more acceptable rule. An investment in planning and carrying out the negotiation phase of reg-neg can well be outweighed by the long-term benefits of reduced costs of compliance, easier enforcement, greater

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Although not mutually exclusive, it is pointed out that the rights model has traditionally been identified with the United States, the participatory model with pre-Charter Canada.

[35] In the Jackman article (1990:28-29) it is observed that participation in decisionmaking is valuable because it enhances the accuracy of decisionmaking by ensuring that the decisionmaker is fully aware of the context of the decision and that all relevant facts are brought to his or her attention; it promotes accountability; it contributes to a sense of justice, at both a subjective and an objective level; and it is necessary for the safeguarding of human dignity and the full realization of individual potentialities. Further discussion of the quality of information underlying regulatory decisions is presented in the section, Improved Basis for Regulations, *infra*.

[36] *See* Chapter 3.0, Section 3.6, Other Applications of the Reg Neg Process, *infra*.

[37] See note 1 in Recommendation 85-5, 1 CFR 305.85, of the Administrative Conference of the United States Sourcebook (1990:15).

[38] For example, some have claimed that the regulatory climate in Canada is quite different from that in the United States: according to Kagan and Bardach (1982), for example, the adversarial style of American regulation generates an "organized culture of resistance" in the business community.

satisfaction, and less litigation.[39]

In general, regulatory negotiation is considered to have the following benefits.[40]

1.4.1.1 Improved Basis for Decisions / Improved Regulations

Regulatory negotiation can provide agencies with a better understanding of the concerns of potentially affected parties, of the relative importance to them of different regulatory choices, and of the factual bases for the regulation.[41] The factual basis for regulatory decisions is particularly significant in discussing regulatory decisionmaking. Briefly stated, the picture that is presented is that in many areas, the time has passed when it was appropriate to think of government ministries as representing a domain of expertise capable of determining regulatory policy on the basis of scientific and technical information submitted by interests such as industry and in-house research divisions. As discussed in greater detail below,[42] the complexity of many regulatory matters is often too great to be simply resolved by scientific experts and the traditional tools of cost-benefit analysis.[43] The British Columbia Round Table, Volume 1, report (1991:7-8) points out in this regard:

> Many people believe that if the technically "right" answer can be found, disputes can be resolved. There are many examples, however, of disagreement over facts between qualified experts. In many of these situations, the focus tends to shift to the credibility of the experts and the legitimacy of the science they are performing. The issue becomes "whose facts", and the tactic is to discredit the opposition. Too often, the real disagreement is over the appropriate questions to be asked, and therefore, agreement on the answers is impossible. The result is that those least qualified to make expert determinations (for example, administrators, judges, or politicians) are forced to choose between sets of facts.

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[39] *See* also British Columbia Round Table (Volume 2, 1991:10, 29).

[40] While many of the benefits ascribed to regulatory negotiation (*see*, for example, Harter 1982:19ff) are based on its advantages over "rulemaking by adjudication", these particular benefits result from the litigious nature of the American rulemaking scene. In this discussion, less attention is paid to these benefits in favour of those that apply more directly to the Canadian situation.

[41] The British Columbia Round Table report, Volume 1 (1991:6) notes: "The stakeholders can bring knowledge and expertise to the decisionmaking process. Greater creativity, increased resources, and a broader range of potential solutions are made available in a consensus approach relative to other modes."

[42] *See*, Section 3.1, The Underlying Rationale for Regulatory Negotiation, in Chapter 3.0.

[43] Susskind and McMahon (*ibid*) comment: If all regulations had a clearly determinable factual basis, arguments about the exercise of agency discretion would be moot. Agencies, however, must also make policy choices in situations where either the desired facts are not available or the available "facts" are contested. In such situations, the agency exercises considerable discretion as it interprets inconsistent facts, balances various and often competing interests, and ultimately makes subjective policy choices with very real economic and political ramifications. In this context, an agency can expect opposition to almost every rule it develops. Tuohy (1982) argues that science is at present incapable of providing unambiguous assessments of the magnitude of risk from a variety of potentially dangerous hazards. She claims that highly analytical aids to policy-making such as cost-benefit analysis and adjudicatory procedures have a useful but limited contribution to make in this domain. At best they should be used as adjuncts to what should be an essentially deliberative and participatory process.

> Negotiation has an appropriate role in the development of the factual basis upon which difficult decisions are made. It is possible to reach agreement on the scientific and technical issues to be addressed (i.e., the appropriate questions), the means by which the facts will be determined, and the experts who will undertake the gathering and interpretation of information. With this approach to facts and science, questions about "what facts" and "whose science" are no longer an issue. The accommodations are reached on the questions, not the answers, and all participants have an equal interest in finding the best solutions.[44]

In addition, it has been observed that when parties are engaged in unilateral activities designed to influence the decision-maker (e.g., litigation, consultation, public hearings), they are more likely to undertake "defensive research" (Harter 1982:21) which may warp the quality of the scientific and technical information submitted. This, in turn, may cause the agency to feel compelled to compile a great amount of factual material to counter other positions and to bolster its own position, although such information may be of marginal value in making the ultimate decision.[45]

In contrast, regulatory negotiation may by-pass unproductive research and focus on the issues of direct interest to the stakeholders. It is commonly recommended in this regard that participants have access to a common resource pool that could be used for neutral research if required. Parties decide together what information is necessary to make a reasonably informed decision. In addition, because negotiation enables parties to rank their concerns and to make trades to maximize their respective interests, the ministry or agency is better informed about what really matters. Even if the negotiating committee fails to reach consensus, the ministry or agency is no longer in a position of having to second-guess stakeholders' priorities and true interests, and thus can better determine a more pragmatic and often superior regulation.[46]

Because regulatory negotiation is likely to produce a better informational basis for

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[44] *See* also Marcus et al. 1984:233.

[45] Evans et al. (1989:240) recount reactions to the consultative process used under the *Transportation of Dangerous Goods Act*, (RSC 1985, c.T-19) in which volumes of material (in excess of 2000 pages) were generated by the government. The Chairman of the Canadian Trucking Association's Dangerous Goods Committee commented: "Certainly we have no complaint about the amount of consultation. Indeed at one stage we suspected that it was a deliberate strategy to snow us under with paper so that we would stop reading it. (It almost worked.) Whenever we would raise a specific concern we would be brushed off with a statement such as this is modified in the next draft (which we would not have, at that point, received). The next draft would indeed be different except that the problem would not be solved, only modified. It is virtually impossible to reach an agreement on anything without starting from some common ground. To make things even more difficult Transport Canada has a marvellous capacity to confuse in the process of explaining. Despite considerable consultation and a non-adversarial relationship we feel that we have not had much influence on the code to date. Perhaps other groups with diametrically opposed views feel the same way. Because of the complexity of the legislation and the large number of interest groups there is certainly need for improvement in the quality of consultation. In particular a procedure must be established by which the respective merits of opposing viewpoints may be judged."

[46] Harter (1982:30) provides an example: "An example of such a trade off process would be when a beneficiary of a proposed regulation argues that the standard should be stringent with early compliance by the regulated company. A company that must comply with the regulation might counter that the standard should be lenient with a long lead time for compliance. An agency faced with this situation might decide to require a lax standard in response to the company's claims of excessive burdens and require a short deadline in response to the need for immediate protection. Everyone involved, however, may be more content with precisely the opposite result. A rule allowing a longer time to implement a more stringent standard might benefit both parties because the shorter time for implementation might cause disruption that would offset any savings resulting from the reduced level of regulation." In the interview with Mr. David Evans, Community Affairs Consultant (also part-time member of the Ontario Environmental Assessment Review Board), April 9, 1993, Mr. Evans noted that he had often, in his role as a neutral, mediated negotiations that resulted in standards that were higher than the agency would have set.

decisionmaking, and because stakeholders are engaged in a mutual problem-solving effort, the process promises the possibility of more creative and innovative suggestions for the proposed regulation. Negotiating parties can explore options together and make trade-offs that otherwise might not arise under conventional rulemaking methods.[47]

1.4.1.2 Less Litigation, Earlier Implementation and Greater Compliance

It has been both predicted and found that regulatory negotiation results in greater satisfaction with the negotiated regulation. Regulations drafted by parties who ultimately must be governed by them are more likely to be practical, and therefore more acceptable to affected persons. Regulatory negotiation is seen as a means of broadening ownership in the process leading to the promulgation of a regulation.

The significant aspect of regulatory negotiation in this regard is that because stakeholders are involved in the development of the regulation, they are more likely to take a proprietary interest in the outcome. This has the additional benefit of reducing court challenges, thereby allowing earlier implementation of the regulation and also fostering greater compliance.[48]

1.4.1.3 Political Validity

It has been observed that the public is increasingly interested in becoming involved in decisions that affect them. As Stewart observed: "The parties who will be affected by a set of regulations should be involved to a greater extent in developing those regulations."[49] Along similar lines, Jackman (1990:27) notes that, given the fact that decisionmaking has been delegated to government departments, administrative agencies and other quasi-government bodies, it is no longer sufficient to rely on parliamentary democracy as a means of participation or control. Regulatory negotiation has the effect of enfranchising those who have important interests at stake but who may be relatively powerless under normal procedures.

In its discussion of rulemaking by quasi-independent regulatory agencies (e.g., CRTC), the Law Reform Commission of Canada (1985:114-116) stated that these agencies, being nonelected legislative bodies operating with a degree of independence from Cabinet, bear "some onus to take into account the views of the constituent publics, those institutions, groups and individuals whose interests may be affected by their decisions. The arrangements for, and the timing of, rule-making should be such that the values of principled decisionmaking and participatory government are supported. A forum should be provided for public participation in rule-making which precedes, or at least operates externally to, agency action on specific cases." Accordingly, the Commission made a number of recommendations aimed at encouraging public participation and agency accountability.

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[47] *See*, for example, Zoll 1988:399.

[48] *See* Administrative Conference of the United States *Sourcebook* 1990:23, 27-46; Ontario Round Table 1992:3-4.

[49] In Perritt 1987:612. *See* also Craven 1990:229ff.

Public participation is seen to have the added benefit of increasing agencies' accountability. Thus, the Ontario Round Table report (1992a:16), for example, points out that ". . . the public wants both to know the process by which the government came to the decision in question and to be implicated in the making of that decision. Through these [ADR] methods of consensual dispute resolution and decisionmaking, public and private authorities become more accountable for the decisions they make." Similarly, in the context of environmental decisionmaking, the British Columbia Round Table (Volume 2, 1991:1) notes that "people are frustrated with the way decisions are being made regarding the environment and natural resources in British Columbia . . . they also felt that the decisionmaking system as a whole is frequently unresponsive to their needs and values."

Unlike consultations or public hearings, which also involve public participation, regulatory negotiation is seen to entail a better way of incorporating the views of stakeholders. As Harter (1982:32-33) points out,

> Although these meetings are clearly a form of negotiation between an interested party and the agency, the negotiation is virtually always sequential. One party talks to the agency and then another and then another and so on. This is *not* the form of negotiation considered in this article. Rather, such negotiation envisions the interested parties sitting down together and addressing the issues together . . . .
>
> Sequential negotiation is substantively different from the negotiation process . . . because such negotiation is merely one form of the adversary process itself: each party attempts to sway the decisionmaker to a favourable disposition. Indeed, the very purpose of the sequential discussions is to persuade the decisionmaker to be sympathetic with the group's views. The competing parties themselves do not meet together to work out an accommodation. Moreover, the agency clearly remains sovereign and takes the position that it is the decisionmaker. The interest groups negotiate as supplicants, not as sharers of the ultimate decision. (Emphasis in the original.)

With respect to consultation, the Ontario Round Table report (1992a:7-8) observes that while government agencies are now required to consult with the public, this mandate imposes no more than the obligation to consult interested parties. The discretion of the decision-maker remains intact, so that the public does not know to what extent its views have been considered (the "black box" mentioned earlier).[50] Moreover, the Ontario report notes that consultation is not appropriate to situations of real conflict where all parties seek to protect rights and interests that may not be clearly defined.

[50] Evans et al. (1989:240) comment, with respect to the Transportation of Dangerous Goods consultative experience mentioned above, that "[T]his experience indicates the care that ought to be taken to design procedures for regulation-making exercises to make them useful experiences for participants, but without converting them into trials. At the same time, consultation may become frustrating if there is not understanding of how other participants and the agency itself respond to comments. A mechanism must be designed to assure participants that their submissions are having some discernible impact, even though the final legislative act will be based on an evaluation of the total situation, and not on the weight of the evidence `on the record'."

Similarly, the British Columbia Round Table report (Volume 2, 1991:8) points out that consultation with stakeholders is usually ad hoc and informal, occurring at the discretion of these agencies rather than as a legal or administrative requirement.[51] The report goes on to note that it is becoming increasingly apparent that the involvement of stakeholders in the formulation of regulations is an essential ingredient in obtaining the support and cooperation needed to effectively implement them.[52]

The political merits of regulatory negotiation do not lie solely with the public: regulatory agencies as well stand to gain by this process. A decision reached via negotiation with all stakeholders provides senior regulatory officials with a political mandate for their decisions; as Harter (1982:7) points out, "[a] regulation that is developed by and has the support of the respective interests would have a political legitimacy that regulations developed under any other process arguably lack." [53] Moreover, if the negotiating parties cannot reach an agreement, the government has an even stronger mandate for determining the regulation.[54] In addition, negotiation forestalls allegations of "agency capture", which are not uncommon.[55]

1.4.1.4 More Cooperative Relationships

It has been found that regulatory negotiation often results in better relationships among traditionally antagonistic interests as well as between the private sector and the regulatory ministry or agency. For example, the United States Environmental Protection Agency (EPA) reports that the process facilitates the exchange of information and understanding of the issues; stakeholders learn about one another's point of view. This had resulted in participants claiming they supported and liked the process because it provided them with a unique opportunity for direct dialogue with the agency decision-makers, to hear other parties' concerns and explain their own, and to present data and arguments before the agency's proposal polarized the interest groups.[56]

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[51] Evans et al. (1989:245) describe a relatively recent case in England that "dramatically illustrates the potential for transforming political promise to legal right."

[52] *See* also the Canadian Round Table report (1993:5). Spokespersons interviewed for this report observed that interest groups no longer want to be merely consulted; they want to be involved in the decisionmaking. For an earlier discussion of the pros and cons of consultation, *see* the review by Evans et al. (1989:230ff) of the recommendations made by the Economic Council of Canada and the federal Standing Joint Committee on Regulations and Other Statutory Instruments (Third and Fourth Reports).

[53] Also, conversation with Mr. Glenn Sigurdson, April 7, 1993.

[54] Conversation with Mr. Glenn Sigurdson, April 7, 1993.

[55] For example, in his discussion of the preferability of "agencies" as opposed to "ministries" (*see* note **Error! Bookmark not defined.**) for oversight of environmental matters, Northey (1991:177) states that ". . . regulatory bodies like the CRTC, for example, do not appear to be captured despite many years of existence. By contrast, Canadian ministers traditionally have reduced environmental control to private negotiations with industry. This alliance has often explicitly excluded the public. . . . Moreover, current problems with ministerial supervision are not simply political, they are also bureaucratic. Experience suggests that Canada may lack federal administrative bodies over the environment [like the American Environmental Protection Agency] because of bureaucratic self-interest. Bureaucracies support ministerial control over agency control: ministerial control maintains bureaucratic powers. This scepticism about bureaucracies is not simply speculative. Bureaucratic interests have already influenced many decisions about the scope of CEPA, and there is no reason to think their influence on CEPA will diminish." *See* also Salter 1982; Stanbury and Thompson 1982; Economic Council of Canada 1982; Tuohy 1982; and Jackman 1990.

[56] Administrative Conference of the United States *Sourcebook* 1990:33. Harter (1982:28) cites Dunlop's comments to the effect: ". . . [regulatory negotiation constitutes] a mechanism for the development of mutual accommodation among the conflicting interests. [Whereas in adjudication or consultation], opposing interests argue their case to the government and not to each other. Direct discussions and negotiations among opposing points of view, where mutual accommodation is mutually desirable as in collective bargaining forces the parties to set priorities among their demands, trading off one for another, which creates an incentive for them to find common ground. The values, perceptions and needs for each become apparent, and some measure of mutual understanding is a by-product." *See* also Thomas 1987.

Although it has been noted that some people are drawn to the idea of negotiation because it seems to be nonadversarial, experienced practitioners point out that negotiations can at times be very adversarial; in fact, should be, at the beginning at least, adversarial in order to reveal the underlying emotions and conflicts.[57] The advantage of regulatory negotiation, however, lies in the fact that it provides a forum wherein participants may move beyond initial confrontation towards problem-solving. Participants are encouraged (and in some applications, trained) in negotiating skills aimed at diffusing adversarial positions.[58]

1.4.1.5 Reduced Time, Money and Effort

This benefit (the saving of time, money and effort) must be qualified to mean that it is likely that there will be a long-term reduction in expenditure of these resources. Some negotiations may be highly time-consuming and very resource-intensive. Nevertheless, it is claimed that overall, this approach (because it often produces regulations that are less likely to be challenged or violated) ultimately saves time, money and effort.[59] Because regulatory negotiation may lead to a decrease in subsequent litigation, regulated parties know at an earlier time how the regulation will affect them. This knowledge enables them to plan capital expenditures or production changes earlier than if they faced years of appeal litigation and uncertainty about the outcome. Similarly, the public also benefits from the promulgation of regulations at an earlier time.

In addition, in many applications the process also saves up-front resources,[60] because the stakeholders are engaged in mutual problem-solving rather than undertaking unilateral activities that are often directed towards establishing positions rather than seeking solutions. For example, Harter (1982:28) notes that because it reduces the need to engage in defensive research, negotiation can be a less expensive means of decisionmaking.

1.4.2 Drawbacks and Concerns

Various drawbacks have been attributed to regulatory negotiation. These reservations and criticisms may vary from one application to another, but overall they

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[57] Conversations with Mr. David Evans (*supra*, note **Error! Bookmark not defined.**) and Mr. Glenn Sigurdson. Mr. Evans pointed out, in passing, that Canadians tend to avoid conflict, which can be detrimental to the negotiating process, because it impairs the ability of participants to "get at" the underlying problems. He also noted that on occasions when there has been a fair bit of acrimony, the press has sometimes tended to sensationalize the event, which is also detrimental to the process. The role of the media is discussed later in this report.

[58] *See* Section 2.3, Stage 3: Negotiation, in Chapter 2.0, and Section 3.4, Training, in Chapter 3.0.

[59] *See*, for example, the British Columbia Round Table report (Volume 2, 1991:5): "The time, effort and dollars spent at the front end of decisionmaking can be more than compensated for in the resources and relationships that are saved by reducing the number of challenges to decisions, and by gaining greater acceptance of, and compliance with, these decisions." *See* also Marcus et al. 1984:233; Ontario Round Table 1992a:1; British Columbia Round Table (Volume 2, 1991:10); Harter 1986:53; and Administrative Conference of the United States *Sourcebook* 1990:50.

[60] Although the research for this report was not able to access documentation (if any exists) of the Canadian situation, American reports, such as that by Susskind and McMahon (1985:133-4) claim that all parties involved in conventional rulemaking complain about the time and expense involved in developing and implementing regulations. Businesses assert that delays are costly and increase the uncertainty surrounding investment decisions. Advocacy groups complain that litigation delays implementation of important rules. Each party tends to think that the agency favours the other.

represent general concerns about the potential usefulness and advisability of the process. The drawbacks have been grouped under several broad categories.

1.4.2.1 Agency Costs and Concerns

Regulatory negotiation can be resource-intensive in the short term for both the ministry or agency and the other participants. While there may be significant long-term savings, there is likely to be a substantial concentration of resources in the short term: the cost of a convenor or mediator; the compression of the schedule for developing the regulation, which may require the agency to allocate staff and technical resources (which are often acquired through contract) during a shorter period of time than in ordinary procedures not involving regulatory negotiation; and the assignment of a senior official to sit at the negotiating table.[61]

It has also been observed that when regulatory negotiation is used, the regulatory ministry's or agency's internal review schedules are also compressed. Officers or managers involved in the issues being regulated need to respond in a timely manner, thus creating additional demands on their time and resources. As Zoll (1988:11) points out, these demands may require ministries or agencies to streamline their normal communication and decisionmaking procedures. It has also been observed that with respect to the availability of technical and scientific expertise (discussed further below), regulatory negotiation normally does not help the ministry or agency to cut back on pre-draft data collection and analysis, as it cannot necessarily depend on other participants to provide the needed data, especially on matters relating to health and environmental risks.[62]

Harter (1982:111-112) observes that the greatest concern about regulatory negotiation is procedural: Will regulatory negotiation work or will it merely add another layer to an already too-protracted process? The concerns here include the following: the use of a convenor may mean that yet another agency becomes involved in the regulatory process, with the inherent opportunity for delay and confusion over the coordination between it and the regulatory agency; the agency may be reluctant to lose control over the process; the agency may believe that it is in a better position to assemble the negotiators; the process of assembling the group may itself become mired in delay and bureaucracy; identifying the appropriate parties as well as knowing when to exclude those who are only tangentially involved may be difficult; the parties themselves may have difficulty in selecting representatives; squabbles may develop over the decision to use a negotiation process or over who participates; the process may not reduce the time and resources necessary for decision; the parties may be unable to reach a decision; the agency may reject the offering and make fundamental changes or begin anew; courts may strike down regulations because of failure to include some party or to develop sufficient factual material.

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[61] For example, the United States Environmental Protection Agency's assessment of the process could not determine whether there were any net savings of EPA resources. Generally, it appeared that pre-proposal costs were only slightly reduced if at all. However, if litigation is avoided and if there is a high degree of compliance, all parties may reap substantial savings (Administrative Conference of the United States *Sourcebook* 1990:32).

[62] Administrative Conference of the United States *Sourcebook* 1990:30. *See*, however, note **Error! Bookmark not defined.**.

Harter acknowledges that these concerns are legitimate because virtually any of them could have an adverse effect on the viability of the reg neg process. However, he also points out that each of these points can be minimized if the process is approached carefully. Upon analysis, he claims, these fears appear exaggerated. Subsequent sections of this report discuss the careful application of regulatory negotiation.

1.4.2.2 NGO Stakeholders' Concerns

Some non-government organization (NGO) stakeholders, such as public-interest groups, may have to provide staff time and resources in excess of those they normally spend on pre-proposal and post-proposal reviews and comments. Their capacity to finance these resources may be limited which, in turn, may impair their ability to participate as equals at the negotiating table.[63]

Building and maintaining a constituency among widely dispersed parties with the same interests may also pose considerable logistical and financial problems. Developing solidarity requires skill, time and money; commodities that may not be readily available. When the regulatory matter involves widely and thinly scattered interests, the practicality of the reg neg process may be jeopardized; or, it may be attempted prematurely, with the result that the negotiations do not truly reflect the public interest; or, it may delay the process, thereby causing a reduction in other parties' commitment or seriously interfere with time-sensitive regulations.[64]

Thomas (1987) observes that some constituencies (especially public-interest groups) need to have a full commitment of resources behind them, including not only the resources to come to and participate in the negotiations, but also the technical resources that would enable them to bring to the table ability comparable with that of other stakeholders such as industry. He claims that not-for-profit groups may be at a greater disadvantage than most in terms of their access to expertise because they normally do not have large staffs of technical experts the way industry often does.

An associated concern is that there may be a risk that some interest groups may be overwhelmed because too many negotiations occur during the same time period; while they might be able to participate effectively in one or two negotiations, their resources may be inadequate to handle a profusion of such processes.[65]

On the other hand, it has been found that some interest groups (e.g., environmentalist advocacy groups, otherwise known as "ENGOs"), have demonstrated considerable abilities to come to the table as technically equal and sophisticated negotiators.[66] To counteract imbalances in relation to technical and

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[63] *See* British Columbia Round Table (Volume 2, 1991:10).

[64] *See*, for example, Hartle and Trebilcock 1982:659 and Perritt 1986:1642 and 1987:625.

[65] *See*, for example, British Columbia Round Table report (Volume 2, 1991:6); also in conversation with Mr. Jim Martin, Director, Regulatory Affairs, Treasury Board, April 8, 1993.

[66] In fact, in one instance, industry representatives complained that they could not match the resources of the environmentalist groups. Conversation with Ms. Wendy Frances, April 7, 1993.

scientific expertise, it has been suggested that negotiating committees have access to a communal resource pool (created for each reg neg committee) to bring in appropriate consultants.[67] While this could solve the equal-access-to-expertise problem, it introduces a further problem of funding: who will finance the resource pool?[68]

1.4.2.3 Attitudes and Potential Problems

To be successful, regulatory negotiation must also overcome negative attitudes, where these are unwarranted, that may exist among both government and nongovernment parties. Many people have reservations about the idea of "negotiation". Public-interest groups, for example, are wary of the idea of "consorting with the enemy" of compromising, or being *perceived* as compromising (in the worst interpretation of the word), their positions at the negotiating table.[69]

Other stakeholders also express concerns. For example, the American EPA assessment of negotiated rulemaking reported that those interviewed about regulatory negotiation commented that pressure to reach consensus makes many people uncomfortable; some expressed concern that negotiations could result in weaker regulations, while others took the opposite view and worried about being forced to make concessions and accept restrictions they would resist in conventional rulemaking. Some interviewees worried about the time involved to develop certain kinds of regulations (e.g., those involving life-and-death decisions), while others worried that they would not have enough time themselves to participate in negotiations. Lastly, several wondered what role the Office of Management and Budget (OMB) plays in negotiated rulemaking and how EPA interacts with OMB; they hoped that EPA-OMB consultations were going on.[70]

The latter point is also a concern in the Canadian context, where sign-off by the responsible minister and the Regulatory Affairs Secretariat of Treasury Board is required for any regulatory proposal.[71] Potential participants worry that their efforts may be ignored. This concern is made particularly acute owing to the fact that ministries are often "threatened" by the regulatory negotiation process. Government corporate managers fear that their authority and accountability are being undermined by the process. This perceived compromise of government authority is discussed by the British Columbia Round Table (Volume 2, 1991:5-6):

> When consensus processes are applied in areas of public policy, there is concern that the government's mandate will be compromised; that by collaborating with stakeholders, government officials may bind themselves to the results of a consensus process, and thereby "fetter their discretion" or lose their impartiality in

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[67] *See* the EPA assessment of negotiated rulemaking in Administrative Conference of the United States *Sourcebook* 1990:30-31.

[68] The funding issue is further discussed later in this report.

[69] Some of these problems have been seen to emerge in Canadian negotiations. Conversation with Mr. Bill Diepeveen, Alberta Environmental Protection Agency, April 7, 1993.

[70] The Office of Management and Budget has veto power over any proposed regulations. *See* Section 3.3.1, Agency Participation, Chapter 3.0.

[71] *See*, for example, Hoffman 1990:81.

their decisionmaking roles. As such, a consensus process could be seen as an abdication of government responsibility.

In this context, the role of consensus processes within the governance system, and the role of government in these processes, must be made clear.

First, limiting an official's discretion should not be an objective of a collaborative approach. Rather, the aim is to help find a solution to sticky issues that satisfies those who are directly affected. As such, the process should be perceived as a means of confirming the will of constituents and building a solid foundation on which to make decisions.[72]

Second, the primary role of government in the process should be to represent the broad provincial [or federal] perspective or public interest (for example, matters of fiscal restraint or an overall provincial planning context), and to ensure that statutory requirements and public policies are observed by the process and its outcome. Government representation will also ensure that the results of the process will hold no surprises for decision-makers, a factor that will greatly assist in the implementation of results.

Third, the ultimate decision-maker (for example, a manager, director, or minister) would not participate directly in a consensus process. Staff members other than the decision-maker would be responsible for representing the government perspective and public policy in the process itself. Overseeing the process would usually be the responsibility of a neutral third party.[73]

Finally, any agreement reached as the result of a collaborative effort should be advisory in nature. Government officials are seeking direction through consensus on the most desirable option; they retain ultimate authority in ensuring that proposed actions are consistent with the law and public policy. In return, the parties to the process might reasonably expect that so long as any agreement met applicable legal and regulatory requirements, it should be regarded favourably by government decision-makers. In these circumstances, if the decision-makers feel that the agreement cannot be approved and implemented, then they should be required to provide reasons for their decisions.[74]

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[72] *See* comments on providing government officials with a political mandate in the earlier section 1.4.1.3, Political Validity.

[73] It should be noted in this regard that for government interest to be properly represented at the negotiations, there needs to be either representation of *all* potential government interests both horizontally in relation to all regulatory departments who may be affected by the proposed regulation, and vertically in relation to federal and provincial government interests or, in lieu of their actual representation, adequate interministerial consultation. *See,* for example, Breger 1988:112.

[74] The Ontario Round Table report (1992a:9) comments that "[P]otential participants may be discouraged from entering into negotiations when they have no assurance that a hard-fought compromise will be respected." *See* the earlier discussion in this report, The Decision Reached Should be Binding. Also, as previously mentioned, spokespersons interviewed for this study repeatedly emphasized the importance of

Similarly, Harter (1982:64) comments:

> A . . . troubling problem arises from the concept of the agency as sovereign. Under a view of agency as the decisionmaker . . . it would be illegitimate for the agency to negotiate with the parties in interest. According to this view, the agency may seek widespread public participation in the rulemaking process by contacting private interests before proposing a rule and by publicizing the development of a rule to permit any interest to submit material for the agency's consideration. But the agency should not jeopardize the exercise of its neutral, detached, expert judgment with too much contact with the parties.
>
> With respect to regulatory negotiation, however, concerns about the concept of the agency as sovereign are misplaced. First and foremost, the agency itself would not be bound by the position taken by its representative during negotiations, any more than any single constituency would be bound irrevocably by the position taken by its representative. Rather, the agency's senior staff would continue to review the proposal to determine whether the proposal reflected the agency's policies sufficiently to merit publication as a proposed rule. The officials in the agency who have final regulatory authority would assess the proposal just as they routinely do under the current process. In traditional rulemaking, the staff develops a proposed regulation, frequently after consultation with affected interests. The staff then submits it to senior officials for review and approval as a proposed regulation. The process of negotiating a proposed rule, therefore, would make more explicit and efficient a process that occurs regularly in current rulemaking.

A further potential problem relates to the question of how parties at the negotiating table could be protected from criticism and possible legal action against them on the part of their constituencies.[75] The Ontario Round Table report (1992a:9) observes in this regard that:

> . . . unlike litigation, where one's potential recourse or liability is among known legal remedies, compensation in consensual resolution is undefined. Although the parties are free to set any mutually agreeable value upon the interests at stake, the absence of fixed guidelines may leave parties uncertain as to what kind of bargain they should settle for. This is especially true in the environment-economy context where the interests in dispute are

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government agencies' commitment to the process and to any agreements that may be reached through a reg neg process.

[75] *See*, for example, Perritt 1986:1639. In conversation with Mr. Lee Doney, Executive Director of the British Columbia Round Table, it was pointed out that this problem may be particularly acute for agency negotiators.

> often not settled through monetary compensation but through regulation by placing restrictions upon a party's license to exploit a natural resource, or by limiting a party's freedom to develop private property. Parties may wonder whether the disputed issues that they conceded were "worth" as much as the concessions made by the other side.

It has been suggested, however, that to forestall problems of this nature the representatives at the table should follow a procedure in which they "negotiate and ratify, negotiate and ratify" with their constituencies continually as the negotiation progresses.[76]

1.4.2.4 The Public Interest

Related to the foregoing concern about compromising government authority is an equal concern about the ability of the reg neg process to represent the public interest. One of the strongest arguments regarding this question is that presented by Funk (1987) in his analysis of the American wood-stove emissions negotiations. Funk claims that the reg neg process has a tendency to obscure, if not pervert, the public interest to the benefit of private interests. He argues that the regulatory negotiation process stands the role of the agency as representative of the public interest on its head by: first, reducing the agency to the level of a mere participant in the formulation of the rule; and second, essentially denying that the agency has any responsibility beyond giving effect to the consensus achieved by the group. In addition, he claims, the rules derived from regulatory negotiation find their legitimacy in the agreement between the parties rather than in the determination under law of the public interest; that is, regulatory negotiation substitutes a private-law remedy for a public-law remedy. In other words, if the parties are happy with the agreement, then it matters not whether the rule is rational or lawful.[77]

Funk asserts that it is a mistake to equate the satisfaction of the parties with the fairness and wisdom of the rule. While recognizing that the likelihood of a decision representing the public interest may be enhanced by ensuring that all interests are at the negotiating table, he states that there are practical and theoretical limitations on the number of interests that may be represented and the quality of representation that each interest may obtain.[78] In short, Funk argues that regulatory negotiation fundamentally alters the dynamics of traditional rulemaking from a search for the public interest, however imperfect that search may be, to a search for a consensus among private parties representing particular interests. Given this view of the process, it is important, he states, that great care be used in determining the appropriateness of the regulations to be decided via regulatory negotiation.

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[76] Conversation with Judge Barry Stewart, May 11, 1993. This advice was reflected in comments received from other spokespersons interviewed for this study. *See* also Section 3.5, Funding, Chapter 3.0.

[77] *See*, however, Salter (1982:507-8) for her analysis of three interpretations of "public interest". According to Salter's discussion, Funk is here adopting a "rationalist" interpretation of the public interest, which is only one way of conceiving of public interest i.e., one that is basically synonymous with procedural rights. For others (whom she refers to as "classical actors") the public interest is an aggregate interest; and for others still (whom she refers to as "critical actors") public interest is what emerges from the debate about the "public interest" itself.

[78] Note, here, that the United States *Federal Advisory Committee Act* (FACA) provisions require a balanced membership. This point is relevant to the later discussion in this report, Legislative Basis of Regulatory Negotiation.

Others, however, are not so pessimistic about the ability of regulatory negotiation to represent the public interest. Hoffman (1990:66ff), for example, points out that ADR remedies such as regulatory negotiation contain the means for ensuring that the public interest is protected: appropriate case selection; procedural safeguards; retention of control by the government over the acceptability of an agreement; public disclosure of agreements and reserving the right to take the case to court if a fair and equitable agreement is not forthcoming. He refers to the statement made by Marshall J. Breger, Chair of the Administrative Conference of the United States (1988), before the United States Subcommittee on Administrative Law and Governmental Relations: "[C]onsensual solutions are by definition ones in which interested members of the public have participated and reached agreement. Far more than outcomes imposed by government agencies, solutions reached via ADR will have the support and understanding, and meet the real needs of agencies and the affected parties."

1.4.2.5 Motivations and Manipulations

One final concern relates to the motivation parties may have for participating in regulatory negotiation. It is noted that under some circumstances industry has a real motivation to delay regulation as long as it can; particularly if the costs of compliance to a potential regulation are high. Latin (1985:1294), for example, states that the replacement of command-and-control standards by a consensus-based regulatory approach would increase industry's leverage and would therefore conflict with the government's preference for prompt imposition of standards designed, for example, to ensure injury prevention.

It is also noted that industry may find regulatory negotiation attractive as a means of obtaining less stringent regulations and standards. As a result, public-interest groups such as ENGOs (environmental nongovernment organizations), for example, will have a commensurate incentive to frustrate the negotiated rulemaking process. In the United States, where litigation (with its provision of technical information through adversarial discovery procedures) is a common strategy for environmental groups (and to a lesser degree in Canada as well), the use of regulatory negotiation may be seen as a loss of leverage for these groups and they may fear dilution of their limited powers.[79] Latin points out that environmental organizations do not want to reach decisions for their own sake, but only when the proposed regulatory decisions further environmental goals. For them, delay may be one of their single greatest weapons when the status quo favours their position. Under these circumstances, it may be unrealistic to expect that they would sacrifice their leverage and come willingly to the negotiating table.

In short, critics such as Latin suggest: "[i]f any major actor sees more gain to be had from adopting extreme position or from delay or postponement of serious participation until formal proceedings are under way, the [negotiated rulemaking] process will not work."

[79] Perritt (1986:1641) points out that interest groups, such as advocacy groups and trade unions, sometimes prefer litigation because of the greater publicity involved, especially if associated with a dramatic victory, as it tends to facilitate fund-raising and other facets of membership support. *See* also Menkel-Meadow 1984.

Furthermore, there is some question as to whether, after the conclusion of negotiations, parties would then resort to whatever options they had forgone in the first place (e.g., litigation, lobbying, media promotion) if they believed that a more desirable result could be obtained in that manner. Accordingly, Latin observes that as long as great interests are at stake and the goals of the major actors are incompatible, which are common characteristics of many regulatory disputes, there is no reason to doubt that participants would manipulate negotiations and would pursue post-negotiation remedies whenever that behaviour is privately advantageous.

Essentially, the situations and potential motives described above provide possible interpretations for what have been called parties' BATNAs best alternatives to negotiated agreements. As described in a subsequent section of this report, BATNA refers to the idea that so long as parties perceive that other strategies may provide better opportunities for gaining what they want, they will be unlikely to negotiate, or to negotiate in good faith. The above descriptions of how interest groups might analyze their options has resulted in two recommendations: first, there should be included in the agreement reached by the negotiating parties a commitment to abide by the agreement (the EPA includes this in its "Signature Document" created at the end of the negotiations); and second, it is very important when considering the use of regulatory negotiation to take into account the appropriateness of this approach, which is the subject of the first section of the next chapter.

2.0 REGULATORY NEGOTIATION PROCEDURES

The Canadian Round Table has developed ten guiding principles of consensus processes. While it is acknowledged that no single approach will work for every situation, it has been found that there are certain characteristics that are fundamental to consensus:

Principle #1 - Reason-based
People need a reason to participate in the process.

Principle #2 - Inclusive Not Exclusive
All parties with a significant interest in the issue should be involved in the consensus process.

Principle #3 - Voluntary Participation
The parties who are affected or interested come to the consensus process voluntarily.

Principle #4 - Self Design
The parties design the consensus process.

Principle #5 - Equal Opportunity
All parties must have equal access to relevant information and the opportunity to participate effectively throughout the process.

Principle #6 - Respect for Diverse Interests
Acceptance of the diverse values, interests, and knowledge of the parties involved in the consensus process is essential.

Principle #7 – Flexibility
Flexibility must be designed into the process.

Principle #8 – Accountability
The parties must be accountable to their constituencies.

Principle #9 - Time Limits
Realistic deadlines are necessary throughout the process.

Principle #10 – Implementation
Any agreement reached in a consensus process must include a commitment among all participants to implementation and effective monitoring of the agreement.

Four stages have been identified to describe the regulatory negotiation process. The first stage consists of making the decision to explore the feasibility and advisability of using regulatory negotiation. It is normally undertaken by the regulatory ministry or agency and involves consideration of the criteria that have been developed to guide the appropriate use of regulatory negotiation. The second stage is what Susskind and McMahon (1985:150) have called the "pre-negotiation stage". The third stage comprises the actual negotiations, and this is followed by the final, post-negotiation stage.

2.1 Stage 1: When to Use Regulatory Negotiation the Criteria

2.1.1 Purpose of Stage 1.1.1 Purpose of Stage 1

Essentially, Stage 1 entails an initial analysis of the circumstances surrounding the proposed regulation. It is the first step in determining whether there are any initial reasons that would automatically exclude the use of regulatory negotiation. This stage is undertaken primarily by the agency or ministry to decide its own willingness and the likely response of other stakeholders, and to make a preliminary assessment of the appropriateness of the proposed regulation for negotiation. In this regard, it has been referred to as incorporating critical "diagnostic work" with respect to the likely outcome of regulatory negotiation.[80] The Canadian Round Table (1993:12-13) summarizes the questions that should be asked before deciding to proceed:

1. Are there issues that need to be addressed?
2. Are the issues addressable at this time?
3. Are the issues negotiable?
4. Can the major interests be identified?
5. Are there representatives who can speak for these interests?
6. Can meaningful deadlines be established for reaching agreement?
7. Are there incentives for reaching agreement? What are the negative consequences of failing to agree?
8. Are the decision-makers who will be required to act on the results of this process willing to be involved, or to act on, or respond to, any agreement reached during the process?
9. Can a viable process be structured? Or, is another decisionmaking process more applicable to resolve these issues?
10. Are there preliminary matters that need to be dealt with before the process gets under way (for example, pre-negotiation to get some participants to the table)?
11. Are there parallel activities occurring that must be considered (for example, a pending legal action)?

2.1.2 The Criteria

Based on experience with regulatory negotiation in the United States, considerable

[80] Conversation with Mr. Chris Kirtz, EPA.

thought has gone into the criteria that should be used to determine whether this method of rulemaking should be used in any given instance. The two major documents describing the criteria to be used to guide the use of reg neg are the ACUS recommendations 82-4 and 85-5.[81] These criteria are aimed at identifying those situations in which regulatory negotiation will have a high probability of success. It is important to keep in mind, however, that these recommendations are guides and must be tailored to specific applications; they provide a conceptual framework only. Essentially, the criteria include the following points.

2.1.2.1 Subject Matter

ACUS recommendation 82-4, paragraph 6, states that the subject matter of the proposed regulation should, of course, be within the jurisdiction of the regulatory authority. As well, it is recommended that it should be clear that in the absence of a consensus, the rule will still be developed and established by the regulating authority. However, prior to the negotiations, the outcome should be genuinely in doubt; that is, one interest should not be so strong (either through political influence or at the table) that the outcome is a foregone conclusion. The British Columbia Round Table report (Volume 1, 1991:15) observes that in order to get people to participate in a consensus-building process, they must perceive that a conflict exists and feel that existing decisionmaking processes are not satisfactory for dealing with it. This, of course, assumes that the regulatory agency or ministry is prepared to make a commitment to accept the negotiated rule. As mentioned in Chapter 1.0, agency commitment to a negotiated regulation (providing that it conforms to the relevant legal requirements) is essential to the success of the process since without this assurance, parties cannot be expected to negotiate in good faith or with much real investment in the process. Accordingly, the agency or ministry must examine the subject matter to be negotiated to determine whether it is prepared to make such a commitment.[82]

2.1.2.2 Issues Involved

It is recommended that there should be a limited number of interrelated issues to be resolved, and yet enough issues to permit prioritization and trade-offs.[83] In addition, the issues involved should be "ripe" or mature, in the sense that they have been the subject of sufficient political debate so that groups with interests in the issues can be identified and their positions and relative strengths evaluated.[84] Issue maturity, it is noted, ensures that a range of alternatives has been formulated for consideration.

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[81] These recommendations are copied in their entirety in Appendix B.

[82] The EPA assessment of its reg neg experience concluded that it is important to determine whether the policy implications of the issues to be resolved are more or less limited programmatically; that is, the rulemaking will not establish precedents that will be binding in program areas not encompassed by the negotiations. Administrative Conference of the United States *Sourcebook* 1990:34-35.

[83] For example, in a regulatory negotiation in British Columbia involving dioxin effluent from pulp mills, the negotiations failed mainly because there were not enough issues to be negotiated. Conversation with Mr. Lee Doney, Executive Director of the British Columbia Round Table, April 13, 1993.

[84] Perritt 1986:1640.

It has also been suggested that the issues should not include any that would require participants to compromise fundamental values or that involve controversial national policy or complex and distorted or sensationalized media issues. It is noted, however, that there is some disagreement about this advice.[85] Where complex scientific or technical issues must be resolved, the necessary data should be readily available.[86] Lastly, it is recommended that ongoing litigation, if any, should be analyzed to make sure that it will not affect participants' willingness or ability to engage in genuine give-and-take; if there is any litigation currently in the courts, it may impair parties' willingness to accept a negotiated outcome that would prejudice their case in court.

2.1.2.3 Time Frame

To facilitate efficiency and forestall delaying tactics, regulatory negotiations should be given a deadline. Care should be taken, however, to ensure that the time available for the negotiations is adequate. Time between negotiating meetings must be sufficient to allow participants to digest and reflect on what has taken place, to talk to each other informally (if they wish), to consult with their constituencies, and to prepare for upcoming meetings. The EPA assessment of its negotiated rulemakings suggests that the interval between meetings should be about four weeks.[87] Some regulations may not be suitable for negotiation because of their urgency.

2.1.2.4 Interests

ACUS recommendation 82-4, paragraph 4(c) advises that the interests significantly affected should be such that individuals can be selected who will adequately represent those interests. There should be a limited number of interests; a rule of thumb might be that negotiations ordinarily should involve no more than 15 participants.[88] In addition, paragraph 4(e) states that no single interest should be able to dominate the negotiations. The agency's representative in the negotiations will not be deemed to possess such power solely by virtue of the agency's ultimate power to promulgate the final rule.

Parties representing the affected interests should be willing to negotiate in good faith, and the regulatory agency should be willing to use the process and participate in it. As well, the agency itself must be willing to negotiate, and senior officials authorized to

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[85] See Susskind and McMahon 1985:710; ACUS recommendation 82-4, para. 4(b); Administrative Conference of the United States *Sourcebook* 1990:34,38. Rubin (1988), for example, in his discussion of international negotiations, observes that the notion of "dispute resolution" (in the concept of "alternative dispute resolution") may place too much emphasis on resolution of conflict, whereas all that may be required in many instances is an agreement that despite underlying conflict, parties will behave in a certain mutually decided way. Marcus et al. (1984:234), on the basis of their analysis of the use of reg neg by the United States Nuclear Regulatory Commission, comment that "[i]f an issue is regarded as non-negotiable by one or more of the parties, if it is impossible to ignore value-laden questions, and/or there is not clear distinction between technical issues and the larger policy questions, then an impasse using current methods of negotiation [i.e., unilateral negotiation] is likely to develop, the need for negotiation is likely to be greatest, and the potential benefits of negotiation are likely to be significant."

[86] The EPA observes that although reg neg is one way of obtaining data, it is not the only or necessarily the best way of getting it.

[87] Administrative Conference of the United States *Sourcebook* 1990:35.

[88] Note, however, that others have claimed that a limit of 15 is not necessary; it is possible, through the use of working groups and caucuses, to accommodate a larger number of interests. *See* note **Error! Bookmark not defined.**.

represent the views of the agency or ministry must be selected and given responsibility to represent the agency at the negotiating table.[89] All stakeholders should view negotiation as being in their best interest if the reg neg process is to be used. As the British Columbia Round Table report (Volume 1, 1991:15) suggests, all relevant interests must share dissatisfaction with the present situation; otherwise, one or more will not be committed to finding a joint solution and can undermine the process by their indifference. Furthermore, each stakeholder must prefer resolution by consensus over other modes of deriving a solution.[90]

2.2 Stage 2: Pre-implementation Stage

Once a determination has been made that the regulatory matter at hand could potentially be appropriate for the use of regulatory negotiation, it is necessary to conduct a more thorough analysis and prepare the stage for the negotiations. In the American literature, it has been suggested that responsibility for this stage be assigned to a convenor.[91] Accordingly, the EPA, for example, has identified two phases belonging to this pre-implementation stage: "convening phases 1 and 2".

It is repeatedly emphasized within the literature on negotiation that this pre-implementation stage is one of the most critical in the process. It is at this stage that first contact with the potential negotiators is made, and the nature of this contact can set the tone for the rest of the process.[92] The skill and competence of the convenor is critical at this stage for the success of the entire process.[93]

2.2.1 Selection of a Convenor

It has been suggested that the convenor should be neutral with respect to the substantive issues to be addressed in the negotiations. This usually means that she or he should come from another agency or from the private sector, and *not* from the regulatory agency involved in the proposed regulation. The importance of the convenor's neutrality

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[89] According to the discussion in the Administrative Conference of the United States *Sourcebook* (1990:38-39), "[e]xperience shows rather dramatically that any agency can find creative ways to sabotage a process it does not like . . . [T]he agency must believe the direct discussions are an appropriate way to develop the proposal. Moreover, a senior official, generally the one who would be responsible for developing a draft rule inside the agency, should participate as a full member of the negotiations so that the agency's views can be incorporated in the deliberations and the agency feels a part of it."

[90] *See* the discussion on BATNAs in Chapter 3.0.

[91] ACUS recommendation 82-4, paragraph 3 states: "In legislation authorizing regulatory negotiation, Congress should authorize agencies to designate a `convenor' to organize the negotiations in a particular proceeding. The convenor should be an individual, government agency, or private organization, neutral with respect to the regulatory policy issues under consideration. If the agency chooses an individual who is an employee of the agency itself, that person should not be associated with either the rulemaking or enforcement staff. The convenor would be responsible for: (i) advising the agency as to whether, in a given proceeding, regulatory negotiation is feasible and is likely to be conducive to the fairer and more efficient conduct of the agency's regulatory program and (ii) determining, in consultation with the agency, who should participate in the negotiations."

[92] Conversation with Mr. Brian Hull, April 3, 1993. *See* also Rubin (1988) who comments that some of the most important work takes place before the parties ever come to the table. It is during pre-negotiation that the parties to the conflict are identified and invited to participate.

[93] It has been found that the pre-negotiation stage may, in some situations, take as much as six to nine months. Conversation with Mr. Stephen Owen, Commissioner of CORE, British Columbia, April 6, 1993.

lies in the fact that it likely will enhance his or her ability to establish a rapport with parties and obtain more comprehensive information from them than could be obtained from a member of the regulatory agency implicated in the negotiations. On the other hand, it is also recognized that it may be possible to use a member of the agency as a convenor if that person has a good working relationship with the affected parties. The advantage of using an agency member is that he or she may have a good understanding of the issues involved and can save the agency money (by not having to hire an outside person). It is suggested that a team of convenors may be necessary when there are many parties and/or issues involved.[94]

Ideally, the person selected as a convenor should have the following attributes: investigative talents, organizational skills, ability to understand and communicate complex issues, and good listening skills. A background in conflict analysis or dispute resolution also can be helpful in evaluating the probability of reaching consensus.[95]

2.2.2 Role and Responsibilities of a Convenor

2.2.2.1 Convening Phase

In Convening Phase 1, the convenor is responsible for:

- assuring that all relevant stakeholders have been identified, and adding additional ones that may have been overlooked;[96]
- discussing the nature of regulatory negotiation with all parties;
- discussing the issues with the parties;
- determining parties' willingness to negotiate;
- reporting to the agency;
- obtaining agency management commitment to the process; and

[94] ACUS recommendation 82-4, paragraph 4 states: "An agency should select and consult with a convenor at earliest practicable time about the feasibility of its using regulatory negotiation. The convenor should conduct a preliminary inquiry to determine whether a reg neg group should be empanelled to develop a proposed rule. The convenor should consider the risks that negotiation procedures would increase the likelihood of a consensus proposal that would limit output, raise prices, restrict entry, or otherwise establish or support unreasonable restraints on competition."

[95] Administrative Conference of the United States *Sourcebook* 1990:98. Thomas (1987) comments that it is critical to the success of the negotiations that the facilitator be technically skilled both in the process of facilitation and in his or her technical understanding of the issues. If one facilitator is not strong in both areas, it may be best to co-facilitate the negotiation meetings.

[96] The Administrative Conference of the United States *Sourcebook* (1990:99) notes that representation of all affected interests in the negotiation is critical if the rule developed is to receive widespread support. The first step is to put together an initial list of potentially affected parties or interests. This is done by talking with the agency staff involved in this rulemaking and in other rulemaking proceedings that have involved similar issues, and by looking at the records of any such proceedings. The statute under which the rule is to be promulgated may specify certain interests that must be contacted. The legislative history may provide additional useful information.

- making a preliminary selection of 15 to 25 participants.[97]

As part of the foregoing tasks, the convenor normally prepares a summary describing the contemplated regulation and the reg neg process. She or he may also prepare a list of assessment questions for use in interviewing prospective parties to find out their interest in the regulation and their views on the scope of the issues. This task also functions as an opportunity to educate stakeholders about the reg neg process.[98]

During the interviews the convenor should explore possible obstacles to the negotiations, such as issues of fundamental values that cannot be compromised; disputes over factual information; issues too numerous or too complex to negotiate; or too many parties. At this stage the convenor may try to explore with the parties and the agency or ministry the possibility of structuring the negotiating committee or the negotiations so as to minimize such obstacles.[99] In this exploration, a tentative consideration of the ground rules for the negotiations may be attempted. Finally, the convenor should use the interviews as a means of discovering any additional interests that might be affected by the proposed regulation, and parties who may be suitable representatives of those interests.

A report by the convenor to the agency, summarizing his or her conclusions regarding this initial exploration, should enable the agency or ministry to decide whether it ought to proceed. At the same time, the convenor should discuss with agency management the issues the parties wish to negotiate, the issues the parties (including the agency)[100] will not, or cannot, negotiate, any obstacles that must be overcome and potential solutions, and a proposed design for the negotiation process itself. The ministry or agency may want the convenor to report to the parties as well, as this can help establish a positive atmosphere that will be valuable if the agency decides to proceed.[101]

The decision to proceed should be based on both procedural and substantive considerations. The procedural considerations may involve examining administrative law provisions to determine whether the appropriate conditions are in place to conduct the negotiations.[102] The substantive considerations basically entail the criteria described

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[97] Administrative Conference of the United States *Sourcebook* 1990:18. Although, as noted elsewhere, others have found that the maximum number may be increased. An alternative suggestion, when there are more than 25 parties, is to explore whether it is possible to aggregate similar or related interests, either to form a coalition or merely to have a common spokesperson, so that the number of negotiators actually sitting at the table is not unwieldy but all affected interests are adequately represented. In such instances, it is important for the negotiator to keep in close contact with each of the differing interests represented. In some cases, it even may be necessary to have the assistance of a mediator to deal with differences among parties represented by a single negotiator. Administrative Conference of the United States *Sourcebook* 1990:100-101. *See* also Harter 1986:59.

[98] *See* ACUS recommendation 82-4, paragraph 5, Appendix B.

[99] The Ontario Round Table (1992a:25) recommends that the government should make initial "conflict assessment" a mandatory step to determine whether a method of ADR is possible for those conflicts involving the government as a party or as a regulatory body. As part of this assessment, the government should consider each existing and new case as a candidate for consensual resolution.

[100] It is suggested that if the agency does not want to negotiate certain issues that may have arisen during discussions with other stakeholders, it may be helpful for the convenor to contact the parties again to confirm whether they would still be interested in participating if particular issues are not "on the table". Administrative Conference of the United States *Sourcebook* 1990:102.

[101] The ACUS recommendation, paragraph 6, states that it may be the case that an existing committee of a nongovernmental standards writing organization [e.g., the Canadian Standards Association] has procedures to ensure fair representation of the respective interests and a process for determining whether the decision actually reflects a consensus among them. If such a committee exists and appears to enjoy the support and confidence of the affected interests, the convenor should consider recommending that negotiations be conducted under that committee's auspices instead of establishing an entirely new framework for negotiations. In such a case, the existing committee could be regarded as a reg neg group for purposes of the regulatory recommendation.

[102] *See* Section 3.7, Legislative Basis for Regulatory Negotiation, section 3.7.1, Arguments in Favour of Legislation.

above. If the agency decides to continue preparing for the negotiations, the convenor may then proceed with Convening Phase 2.

2.2.2.2 Convening Phase 2.2.2.2 Convening Phase 2

Convening Phase 2 moves the pre-implementation stage to the point where parties are ready for the negotiations. According to the EPA analysis *(supra)*, it entails the following steps:

- obtain parties' commitment to negotiate;
- publish "notice of intent to negotiate";
- select a facilitator or mediator;
- respond to public comments on "notice";
- adjust committee membership if necessary;
- arrange organizational meeting; and
- arrange the negotiating committee orientation or training.

During Convening Phase 2, the convenor contacts each party again to obtain a more formal commitment to participate in the negotiations. The agency or ministry must publish in the *Canada Gazette, Part I,* a notice of its intent to conduct a negotiated rulemaking, and requesting comment on the issues to be negotiated and the proposed list of participating parties. As a result of this notice, additional parties may contact the agency, seeking inclusion in the negotiations. The convenor and the agency staff should talk with these parties, or otherwise contact them, and determine whether they represent additional interests or whether those interests are already adequately represented.[103]

New issues may also surface in the public comments or in the course of any resulting interviews. The convenor and the agency staff should review these issues and decide whether they are within the scope of the negotiation and if the agency is willing to negotiate them. If they are found to be appropriate, the issues should be scheduled for discussion at the initial or organizational meeting of the negotiating committee.

During this phase, the agency must also decide whether to use a third-party neutral (mediator) or facilitator. As ACUS recommendation 82-4, paragraph 10, points out, where participants lack relevant negotiating experience, a mediator may be of significant

[103] ACUS recommendation 82-4, paragraph 7 states: "The agency should publish in the *Federal Register* a notice that it is contemplating developing a rule by negotiation and indicate in the notice the issues involved and the participants and interests already identified. If an additional person or interest petitions for membership or representation in the negotiating group, the convenor, in consultation with the agency, should determine whether that interest would be substantially affected and if so, whether it would be represented by an individual already in the negotiating group and whether in any event the petitioner should be added to the group, or whether interests can be consolidated and still provide adequate representation."

help in making them comfortable with the process and in resolving impasses. It is noted further that use of a third-party neutral allows the agency representative to advocate the agency's or ministry's interests at the negotiating table without having to be concerned with procedural matters relating to the conduct of the meeting. For large negotiations, a team of facilitators has been used to provide more complete assistance in facilitating both the plenary meetings of the group and meetings of subcommittees or caucuses.[104]

Finally, the agency or ministry may wish to arrange a training and/or orientation session for negotiating parties. Participants in negotiated rulemaking procedures may not have had much experience with negotiation, and it has been found that there is a wide disparity in negotiation skills and confidence among stakeholders. Accordingly, the reg neg process in the United States has often begun with a pre-negotiation training and orientation session, which provides a chance for the participants to get together in an informal educational setting and helps "level the playing field" with regard to negotiating skills before the beginning of the committee's actual work.[105]

2.3 Stage 3: Negotiation

Before the substantive aspects of the negotiations can begin, the negotiating committee must first undertake a number of organizational tasks to structure the meetings. The committee should decide on a number of things, including:

- the ground rules or protocols (e.g., for attendance, confidentiality, and the sharing of information) that will structure the meetings;[106]
- a definition of "consensus";[107]
- determination of what will happen if consensus is not achieved (the fallback);[108]
- how the participants (including the agency or ministry) will act upon agreement;[109]

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[104] Administrative Conference of the United States *Sourcebook* 1990:103.

[105] Administrative Conference of the United States *Sourcebook* 1990:161. Further discussion of training is provided in Chapter 3.0.

[106] Examples of protocols are available in Administrative Conference of the United States *Sourcebook* 1990:187-196. *See* also Thomas 1987. *See* Chapter 3.0, Section 3.3.4, Role of the Media, for a further discussion on confidentiality.

[107] *See* Chapter 1.0, the discussion on consensus.

[108] ACUS recommendation 92-4, paragraph 11 states: "The goal of the negotiating group should be to arrive at a consensus on a proposed rule. Consensus in this context means that each interest represented in the group concurs in the result, unless all members of the group agree at the outset on another definition. Following consensus, the negotiating group should prepare a report to the agency containing its proposed rule and a concise general statement of its basis and purpose. The report should also describe the factual material on which the group relied in preparing its proposed regulation, for inclusion in the agency's record of the proceedings. The participants may, of course, be unable to reach a consensus on a proposed rule, and in that event they should identify in the report both the areas in which they are agreed and the areas in which consensus could not be reached. This could serve to narrow the issues in dispute, identify information necessary to resolve issues, rank priorities and identify potentially acceptable solutions."

[109] ACUS recommendation 85-5, paragraph 2, states: "Negotiations are unlikely to succeed unless all participants (including the agency) are motivated throughout the process by the view that a negotiated agreement will provide a better alternative than a rule developed under traditional processes. The agency, accordingly, should be sensitive to each participant's need to have a reasonably clear expectation of the consequences of not reaching a consensus. Agencies must be mindful, from the beginning to the end of negotiations, of the impact that agency conduct and statements have on party expectations. The agency and others involved in the negotiations, may need to communicate with other participants

- a meeting schedule of milestones and confirmation of the agency's deadline;

- identification of the parties' responsibilities to represent their constituents accurately and to keep their constituencies informed of the process;

- methods of providing checks to ensure constituents are kept informed;

- publication notices of meetings;

- the nature of the agency's or ministry's participation;[110]

- methods of recording the meetings;

- the use of caucuses and subcommittees, if necessary; and

- meeting management; that is, whether to use a third-party neutral and deciding his or her role and responsibilities.

Reaching agreement on how the committee is to proceed provides parties with an opportunity to practice and experience reaching agreement before they address substantive issues.[111]

Some of these decisions should already have been taken by the agency and the convenor, although they may require review and agreement by the committee itself. The Administrative Conference of the United States *Sourcebook* (1990:174-177) distinguishes between those issues that should be decided by the agency before the negotiating committee meets, and those that should be resolved by the committee as a whole, as described below.

2.3.1 Agency or Ministry Decisions

Agency Coordination

The questions are: Who will negotiate on behalf of the agency or ministry? How will the agency's negotiator interact and coordinate with agency rulemaking and technical staff, consultants, managers, and top decision-makers, so that the negotiator can act effectively without delaying the negotiations? What other programs or offices (within the agency or

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perhaps with the assistance of a mediator or facilitator to ensure that each one has realistic expectations about the outcome of agency action in the absence of a negotiated agreement. Communications of this character always should consist of an honest expression of agency actions that are realistically possible."

[110] ACUS recommendation 85-5, paragraph 1 states: "An agency sponsoring a negotiated rulemaking proceedings should take part in the negotiations. Agency participation can occur in various ways. The range of possibilities extends from full participation as a negotiator to acting as an observer and commenting on possible agency reactions and concerns. Agency representatives participating in negotiations should be sufficiently senior in rank to be able to express agency views with credibility."

[111] Canadian Round Table 1993:14 and conversation with Mr. Glenn Sigurdson, April 7, 1993.

in other agencies) will be affected by or interested in the proceedings?[112] How will the negotiator deal with other interested federal agencies (including the Regulatory Affairs Secretariat and parliamentary committees) and with the news media?

Issue Selection and Management

What issues are negotiable? What constraints are imposed on each of these issues by statute and by agency policy? What positions will the agency take initially? What is the range of solutions acceptable to the agency? What are the expected needs and positions of the other parties at the table? Do the issues lend themselves to consideration by subcommittees? Will the negotiating committee need access to contract resources for research and investigation? If so, how will these resources be made available and managed? How will the issues be communicated to the parties?[113]

Desired Outcomes

What is the agency's desired outcome: a draft rule or set of resolved issues for agency use in drafting the rule? Will the agency offer as a starting point for negotiations its own draft rule or a set of issues formulated by the agency? (An initial draft can speed up or hinder the progress of negotiations, depending on whether the parties feel that their input is really desired.)

Consensus

What is the agency's definition of consensus? What does the agency plan to do if consensus is not reached on all issues?

Timing

What is the deadline for reaching agreement? What is the source of the deadline? How flexible is the deadline? What happens if the deadline is not met?[114]

Logistical Arrangements

Where should meetings be held? How much space is needed? Will rooms be needed for subgroup meetings? What supplies are needed (audio-visual equipment, paper, pens, easels and large pads for display of agendas and proposals, name tags, name plates, and so on), and who is responsible for providing them (agency, contractor, mediator)? Should snacks and lunches be served during meetings to reduce the time spent reassembling the

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[112] *See* Section 3.3.1, Agency Participation, in Chapter 3.0.

[113] The Administrative Conference of the United States *Sourcebook* (1990:179) comments that in framing the issues to be negotiated, the committee will probably want to identify any underlying assumptions that participants may have. Sometimes it is helpful to cluster related issues, either as an aid to setting the agenda for the committee or for assignment to subcommittees for more focused attention.

[114] The Administrative Conference of the United States *Sourcebook* (1990:181) claims that about 90 percent of the progress in a negotiation occurs in the last 10 percent of the time allowed and it is therefore important that the negotiations be driven by a deadline. If the deadline is imposed upon the agency, the agency must be prepared to take steps to meet the deadline even if negotiations reach an impasse. Where the agency itself has created the deadline, the agency can decide to extend the deadline if the parties appear to be close to consensus or a breakthrough in the negotiations appears imminent. However, all parties, including the agency, should feel some pressure to reach a resolution by the deadline.

committee? Should the agency or the participants pay for snacks and lunches?

Committee Resources

What resources will the agency make available for the committee, such as computers, conference rooms, secretarial services, or funds for travel or expert consultants?

Notices

What notices are appropriate or required and where should they be published?[115] Who is responsible for writing the notices and when must they be published?

2.3.2 Committee Decisions

Scheduling of Meetings

How many meetings will be needed to address the issues? How should meetings of the full committee and of subcommittees (if any) be coordinated? How often should meetings occur? Where should meetings be held ? in what city or in what variety of locations, and on whose premises? Can a schedule be set in advance to reduce the administrative burden of accommodating dozens of people's calendars and finding available conference facilities?

Advisers and Observers

Because each committee member represents some constituency, each can be expected to have one or more advisers. When should these advisers be allowed to speak at meetings? Since committee meetings may be open to the public, how will questions or statements from observers be handled? How will the committee handle written public comments received during the negotiations? Should there be any special provisions for dealing with the media?

Agendas

Will the agency or the mediator propose agendas? What is the procedure for the committee to change the proposed agenda?

Recording and Communication

Who will write minutes and how detailed do they have to be? How and when will minutes be distributed? Who will handle communications between agency and committee members, and among the committee members: the agency staff or the mediator, or some combination of the two? What restrictions will be set on future use of

[115] It is interesting to note that in Victoria, Australia, more comprehensive measures are undertaken in the notice procedures. In his review of the Victorian *Subordinate Legislation Act* (*infra*, p. 114), Craven (1990:266) observes that the Act (section 12(1)) requires that the notice of rulemaking must be published as widely as possible: not merely in some little-read government gazette, but also in daily newspapers and any relevant specialist journals.

records, documents exchanged by negotiators, and statements? (Documents generated by the committee are public documents, but the parties probably will want to agree, for example, that written or oral statements made during the negotiation will not be used by other parties in any later litigation.)

Caucuses and Subcommittee Meetings

Are subcommittees or working groups needed to focus on specific issues? How often will they meet? How will caucuses be called? Will a mediator be available for caucuses and subcommittee meetings? How will reports from these meetings be made to the full committee?[116]

Use of Available Resources

How will the committee use and manage any available resources, including funds for travel or consultants?[117]

Consensus

What is the committee's definition of consensus? Will the committee members be required to sign an agreement to signify consensus? Is the committee aiming for agreement on specific regulatory language or agreement on general principles?

There is no right way to handle any of the above questions; much depends on the rule under negotiation, the participants and the time frame available for the negotiation. Organizational details should be decided by the committee at its first meeting. As noted above, the agency should have, wherever possible, addressed these issues before the beginning of the negotiations, and should be prepared to make some suggestions regarding procedures and schedules for the committee's consideration at the first meeting.[118]

At the first meeting, the agency or ministry should propose an agenda that includes introduction of the participants and identification of the interests they represent, a briefing on the concept of regulatory negotiation, a discussion of the issues involved in

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[116] The Administrative Conference of the United States *Sourcebook* (1990:180) observes that subcommittees or working groups may be formed in order to assemble data, or to examine issues and prepare proposals for consideration by the full committee. Subcommittees should have a balanced membership and should not be authorized to make final decisions. Parties with allied interests may want to caucus for the purpose of exploring joint negotiating positions, and such meetings should not be considered as subcommittee meetings. It is usually more convenient to schedule subcommittee meetings on the day before or the day after a meeting of the full committee, particularly if members come to the negotiations from different parts of the country. If subcommittees are scheduled to meet at the same time, it is important to ensure that any parties who want to participate in more than one of the concurrent meetings will have sufficient manpower to do so. An interest may be represented on a subcommittee by its designated member of the full committee, by a formally designated alternate representative, or by any other person with appropriate expertise. Some experience in Canada suggests that some ground rules need to be developed regarding the relationship between subcommittees and the plenary group. For example, in the FEARO negotiations it was found that when the subcommittees reported back to the group, the issues were debated all over again. Conversation with Ms. Wendy Frances. A brief review of the FEARO regulatory negotiations is included in Appendix D.

[117] The Administrative Conference of the United States *Sourcebook* (1990:180) notes that some agencies have made technical consultants available to negotiating committees to assist them as needed during the negotiations. In other instances, the committee has retained an expert either to advise the entire group or to advise an individual interest.

[118] For example, EPA drafts organizational protocols and protocols to govern the use of resources that may be available to the committee (i.e., the resource pool) for presentation at the committee's organizational meeting.

the rule under negotiation, and proposals for operation of the committee. It has been suggested that when the organizational issues are resolved, it is helpful for the third-party neutral to emphasize the positive idea that the committee has already reached consensus on a number of issues. If the notice of the proposed negotiation resulted in additional parties requesting representation or additional issues to be negotiated, these topics may also be addressed at the organizational meeting.

2.3.3 The Negotiating Sessions

As the committee begins negotiation of the substantive issues, one of the first things that must be agreed upon is what issues will be negotiated and what issues will have to be put aside because it is perceived that they will not be amenable to negotiation. The second important task is prioritizing the issues so that the committee can understand what the more important problems are.[119]

While each committee's approach to negotiation will depend on the individual circumstances and the personalities involved, some general observations have been found useful in successful reg neg sessions. One of the chief sources for guidance in this area is the book, *Getting to Yes*, by Fisher and Ury (1991).[120] Basically, Fisher and Ury begin with the premise that there are two levels at which negotiation takes place: one addresses substantive issues, and the other is about "how you get there" : the procedures negotiators use to get what they want. The Harvard Negotiation Project developed procedures that are neither "hard" nor "soft", but are methods "designed to produce wise outcomes efficiently and amicably".[121]

These methods, called "principled negotiation" or "negotiation on the merits", can be summarized to embrace four basic points:

People: Separate the people from the problem.

Interests: Focus on interests, not positions.

Options: Generate a variety of possibilities before deciding what to do.

Criteria: Insist that the result be based on some objective standard.[122]

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[119] Conversation with Mr. Mike Kelly, Executive Director of CASA, April 7, 1993. *See* also Administrative Conference of the United States *Sourcebook* 1990.

[120] The 1991 edition of this book is a more recent update of the basic principles provided in the original *Getting to Yes: Negotiating Agreement Without Giving In* (New York: Penguin, 1981). (Note, as well, that *Getting to Yes* is now available on videotape from: Nathan/Tyler, 535 Boylston St., Boston, MA., 02116; tel: (617) 247-8890.) Other books, among many, that have been found helpful include: *Getting Past No: Negotiating Your Way From Confrontation to Cooperation* by William Ury, Newbury Park, CA.: Sage Publications (1993); *Getting Past No: Negotiating with Difficult People* by William Ury, Bantam Books (1991); *Dispute Resolution* by Stephen B. Goldberg, Nancy Rogers and Frank E.A. Sandler, Boston, MA.: Little, Brown and Company (1992); *New Approaches to Resolving Public Disputes* by Denise Madigan, Gerard McMahon, Lawrence Susskind and Stephanie Rolley, Washington, D.C.: National Institute for Dispute Resolution (1990). It is interesting to note that during the recent Canadian constitutional debate, a negotiation of the constitutional issues was mediated by Roger Fisher and two assistants from the Harvard Negotiation Project. These negotiations were covered by *Maclean's* (July 1, 1991 and January 6, 1992).

[121] *Ibid.*:10.

[122] This point refers to the problem that occurs when interests are directly opposed. In this situation a negotiator may be able to obtain a favourable result simply by being stubborn. That method tends to reward intransigence and produce arbitrary results. Fisher and Ury claim,

The thesis underlying Fisher and Ury's approach has been described as follows:

> Behind opposed positions lie shared and compatible interests, as well as conflicting ones. We tend to assume that because the other side's positions are opposed to ours, their interests must also be opposed. If we have an interest in defending ourselves, then they must want to attack us. If we have an interest in minimizing the rent, then their interest must be to maximize it. In many negotiations, however, a close examination of the underlying issues will reveal the existence of many more interests that are shared or compatible than ones that are opposed.[123]

While Fisher and Ury's approach has been criticized because it ignores another aspect of bargaining, "distributional bargaining", where one for me is minus one for you,[124] Fisher claims that the principled negotiation method can incorporate the distributional issue by treating it as a shared problem rather than a contest of wills resulting in winners and losers.

The Fisher and Ury principled negotiation approach is similar to that described by Menkel-Meadow (1984) in which she contrasts the advantages derived from a "problem-solving approach" to the limitations involved in negotiation strategies based on a zero-sum game approach, where maximizing individual gain is paramount (and which she claims is based on faulty assumptions).[125]

In contrast, problem-solving negotiation involves an orientation that focuses on finding solutions to the parties' sets of underlying needs and objectives. The problem-solving approach subordinates strategies and tactics to the process of identifying possible solutions, and therefore allows a broader range of outcomes to negotiation problems. Menkel-Meadow points out that it is important to understand that the problem-solving

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however, that you can counter such a negotiator by insisting that his single say-so is not enough and that the agreement must reflect some fair standard independent of the naked will of either side (e.g., market value, expert opinion, custom, or law). By discussing such criteria rather than what the parties are willing or unwilling to do, neither party need give in to the other; both can defer to a fair solution. *Ibid*.:12. As the committee begins its substantive negotiations, it may have to decide what information is required to make a responsible decision. Harter (1986:59) points out that one of the major values of this process is that the parties bring with them, or can otherwise obtain, insight and perspectives for developing a workable solution to the regulatory question. In addition, the negotiating group will typically be furnished with technical information developed by the agency or ministry. It has already been noted in this regard that the committee may wish to set up a resource pool that the committee can draw on for the preparation of further data that may be required. ACUS recommendation 85-5, paragraphs 8 and 9, states: "Where appropriate, the agency, the mediator or facilitator, or the negotiating group should consider appointing a neutral outside individual who could receive confidential data, evaluate it, and report to the negotiators. The parties would need to agree upon the protection to be given confidential data. A similar procedure may also be desirable in order to permit neutral technical advice to be given in connection with complex data. Use of a `resource pool' may be desirable to support travel, training, or other appropriate costs, either incurred by participants or expended on behalf of the negotiating group. The feasibility of creating such a pool from the agency should be considered in the pre-negotiation stages."

[123] *Ibid*.: 43.

[124] White 1984:116.

[125] Firstly, according to Menkel-Meadow, a zero-sum game loses its zero-sum qualities and its assumptions when more than one issue is negotiated because trade-offs between issues are possible. Secondly, at the core of zero-sum thinking is an assumption that parties value the fixed resource equally. Thirdly, by assuming there is only one issue . . . other issues of concerns of the parties may be masked and remain unresolved. Finally, by assuming that the "materiel" of the negotiation is fixed or limited in some way, the parties may lose opportunities to expand the materiel before some division is necessary.

Ibid.:784-788.

approach is not simply another strategy but should properly be conceived as a paradigm requiring the commitment of all parties.[126] Both Menkel-Meadow's and Fisher and Ury's methods offer a number of guidelines and suggestions about how to deal with negotiators who are not oriented to a problem-solving conception of the negotiation process.

While this subject deserves more time and analysis, it is not possible in this report to review the different methods that have been proposed for developing better negotiating skills and more productive negotiations (the reader will find many books that have been written recently on this subject). Among the issues that are receiving greater attention in this area are gender and ethnocultural differences in negotiations, the skills and expertise required for participants, the role of the third-party neutral, and means of overcoming impasses. According to some professional neutrals, the individual interpersonal skills, negotiating experience and attitudes that negotiating members bring to the table can make an overwhelming difference to the outcome of the proceedings.[127]

It must be emphasized that the value of the problem-solving approach to negotiation is receiving increasingly greater recognition. Particularly in today's world, where regulatory competitiveness is a major concern, it makes little sense to think of negotiations in terms of winners and losers. As one spokesperson for this study commented, "[i]f Canada is to be internationally competitive, it makes little sense to waste the abilities of highly intelligent people by sending them into a situation in which the main objective is to maximize individual gain and to make the other party look stupid; this is not the way to generate good solutions if you want to remain competitive."[128]

2.4 Stage 4: Closure and Post-negotiation

2.4.1 The Outcome

There are, of course, two possible outcomes of the negotiations: agreement on the proposed regulation, or lack of agreement (or only partial agreement). Thus, the reg neg committee has finished its work when it reaches consensus on the issues under negotiation or when it decides that consensus cannot be reached on all the parts of the regulation. It will be recalled from Chapter 1.0 that consensus, depending on how it is defined by the negotiating committee, does not mean agreement on every issue: "agreement to disagree is sometimes vital to successful negotiations".[129] Rather, it normally means that parties have agreed to concur with the proposal drafted by the committee and no party dissents significantly from the shared position.

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[126] In Zoll's words (1988:2), this approach represents a "new cultural attitude". Along similar lines, Mr. David Evans commented that what is needed is not simply a national strategy, but a national *climate*. By "climate" he suggests, for example, that legislation might provide that if a negotiation falls within parameters set out by government, then the results ought not to be subject to political processes, but that the decision reached should automatically be accepted by the government. In addition, the process should be subject to a time limit so that if the parties cannot come to an agreement, the government can step in and make a decision. Conditions such as these would help provide the necessary climate for the reg neg process and at the same time provide a penalty for "bad faith" bargaining and stalling.

[127] Conversation with Ms. Susie Washington, October 10, 1993.

[128] Conversation with Judge Barry Stewart, May 11, 1993.

[129] Gulliver 1973:681.

If consensus is reached, the committee may transmit the agreements reached on each of the issues or it may be able to provide specific proposed language for the draft regulation. If the committee terminates its work without reaching consensus, it may wish to identify which issues (if any) it was able to resolve and which issues remained, a summary of the areas of disagreement, and the ranges of solutions discussed. It is noted that negotiations that do not end in consensus may nonetheless provide the agency with invaluable information about the parties and the issues, thereby enabling the agency to propose a regulation that is satisfactory to many of the parties. It is reported that agencies that have had negotiations end short of consensus have reported that the additional knowledge gained during the negotiations made the process worthwhile.[130]

Depending in part on what the agency or ministry promised at the beginning of the negotiations and on what the committee transmits to the agency, the agency may have a number of choices regarding the results of the negotiations. If the committee's consensus is in the form of a draft regulation and the agency promised to publish the committee's draft as the proposed rule, the draft would go through internal review and sign-off, and the concurrence of the Regulatory Affairs Secretariat, prior to publication in the *Canada Gazette.* If the committee's consensus is in the form of recommendations on the issues, the agency staff will draft the rule based on these recommendations and will follow the normal internal and external review procedures.

As noted in Chapter 1.0, the agency is always responsible for ensuring that the regulation is consistent with statutory requirements. If, owing to statutory constraints or as a result of internal agency review, it is found that significant changes would have to be made to the regulation before publication, the committee members should be notified or briefed regarding the changes. It is also recommended that the notice in the *Canada Gazette* should make clear any departures in the text from the negotiated agreement.[131]

At this stage the proposed regulation is subject to public comment. It is recommended that it may be advantageous to keep the committee in existence long enough to be able to review the public comments.[132] The ACUS recommendation 82-4, paragraph 14, recommends in this regard that "[T]he negotiating group should be afforded an opportunity to review any comments that are received in response to the notice of proposed rulemaking so that the participants can determine whether their recommendations should be modified. The final responsibility for issuing the rule would remain with the agency." It is also recommended that if the committee is to review public comments, these consultations should take place in public.[133]

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[130] Administrative Conference of the United States *Sourcebook* 1990:197.

[131] Administrative Conference of the United States *Sourcebook* 1990:198. The ACUS recommendation 82-4, paragraph 13 states: "The agency should publish the negotiated text of the proposed rule in its notice of proposed rulemaking. If the agency does not publish the negotiated text it should explain its reasons. The agency may wish to propose amendments or modifications to the negotiated proposed rule but it should do so in such a manner that the public at large can identify the work of the agency and of the negotiating group." The importance of agency accountability in this regard was emphasized in conversation with a number of Canadian spokespersons.

[132] For example, the United States Department of Transportation follows this practice. Administrative Conference of the United States *Sourcebook* 1990:51.

[133] Neil Eisner (Assistant General Counsel for Regulation and Enforcement at the United States Department of Transportation, for example, explains: "[T]here is a strong argument for making it clear that the committee's work is not considered completed until it has made a recommendation on the final rule. We have found that it is easy for many people to sit around the table and make recommendations for a notice of proposed rulemaking, because it will then be subject to comment . . . Having to `bite the bullet' and make recommendations for a final rule, based on public comment, is a much more difficult task, which is, I believe, one of the primary objectives of regulation negotiation."

2.4.2 Records and Evaluation

It has been found useful to have the agency, mediator and another external neutral party evaluate the effectiveness of the reg neg proceedings. Among the issues that can be evaluated are: how well the regulatory negotiation fulfilled the goals of the agency and the other participants; the degree of satisfaction among participants and agency management; the volume and tenor of public comment; and subsequent litigation, if any. Even without a formal evaluation, much benefit can be gained from records of the proceedings if events have been documented, including documentation of lessons learned; the types of issues that are negotiable; how much preparation must precede the negotiations; and what resources were needed to conduct the negotiation.[134] As well, the records of the committee meetings, including a written summary of the results, are necessary to provide the agency with valuable information upon which to base the regulation and its preamble.

Recordkeeping and proper documentation could also greatly help other agencies and stakeholders who may wish to undertake regulatory negotiation. As noted below, one or two good examples of regulatory negotiation could be a strong incentive for other parties to try it.[135] The Administrative Conference of the United States encourages agencies to share with other agencies their assessments and the lessons they have learned. The Conference acts as a clearinghouse for information about such proceedings. While Canada does not have an agency like ACUS, it may be possible that this function could be provided by another agency, or perhaps an agency similar to ACUS could be created.

2.5 Summary of Reg Neg Procedures

Four main stages have been identified in regulatory negotiation. The first two stages (and most particularly the first) are highly critical to the success of the process insofar as they lay the groundwork for the appropriate use of regulatory negotiation. It has been pointed out that the tasks involved in these stages follow the adage, "Go slow to go fast".[136]

Regulatory negotiation is not suitable for all rulemaking situations.[137] Careful selection of the "right" situation in which to use reg neg is important and includes an assessment of the subject matter, the issues involved, availability and motivation of parties, and timing, as well as the agency's or ministry's commitment to the process.

The regulatory process can be time-consuming and resource-intensive, involving adjustment of the agency's management and decision making procedures to accommodate the process, and the employment of a convenor and, typically, a third-party neutral.

Administrative Conference of the United States *Sourcebook* 1990:198.

[134] *See*, for example, Osherenko 1989:25.

[135] It was observed that numerous negotiations have taken place without documentation, which has had the result of depriving others of information about how these negotiations proceeded. Conversation with Mr. David Evans, April 9, 1993.

[136] Conversation with Mr. Chris Kirtz, EPA, April 7. 1993.

[137] *See* Section 4.1, The Appropriateness of Regulatory Negotiation, in Chapter 4.0.

Before actual negotiation of the issues implicated in the proposed regulation can begin, the negotiating committee must make a number of procedural decisions that will guide the proceedings. Further costs arise from travel, hospitality, and the creation of a resource pool, if necessary.

Comprehensive record keeping and documentation of the proceedings is advised in order to assist the agency in its final regulatory proposal and to provide others with information about the process. Evaluation of the process is also recommended. The following figure summarizes the four main stages described above.

(This figure is not presently available)

3.0 ISSUES AND APPLICATIONS

3.1 Underlying Rationale for Regulatory Negotiation

Chapter 1.0 of this report briefly outlined the nature and advantages of regulatory negotiation. Underlying these claims and observations is a history of regulation that warrants further description. Essentially, the development of regulatory negotiation has been seen to stem from an evolutionary process in regulation that has resulted in greater awareness that regulatory decisions are, owing to the limitations of available scientific and technical knowledge, ultimately political, therefore requiring decisionmaking structures that reflect this reality.[138]

3.1.1 The American Situation

Harter (1982), in his analysis of American regulatory malaise, describes an evolutionary process that may be seen as roughly parallelled in the Canadian context, at least with respect to the general themes involved. Without going into detail about particular regulatory events, the picture that emerges is one that began with what might be called an "agency expertise model" wherein the regulatory authority functioned as an "expert guardian" of the public interest. Through the legislative powers delegated to it, the agency was viewed as capable of acting as the ultimate arbiter of facts and arguments represented by different stakeholders. However, in the 1960s when regulatory issues were becoming increasingly complex, an evolution began towards much greater public involvement in the regulatory process. This change was reflected in a number of events. The American *Administrative Procedure Act* (APA) was augmented by new statutes requiring substantial evidence to support an agency regulation. In addition, the American courts played a far stronger role in regulatory procedures, requiring agencies to develop greater factual information to support rules.

At the same time that American courts were given greater powers of judicial review[139] wherein increasing attention was focused on regulatory agencies' factual and logical bases for regulations, the use of public hearings also increased, granting the public a far greater role in providing information and forcing agencies to respond to parties' arguments. In short, this period saw an erosion of the broad discretion that had been previously granted to regulatory agencies. In Harter's words (1982:14), "[T]hese changes coalesced to convert the agency from an expert guardian of the public interest to a form of `umpire', albeit an active one."

Two developments accompanied (and to a large extent, caused) these changes: the dramatic increase in the complexity of regulatory matters (which has, in many applications, outpaced the ability of science to provide answers) and the fact that interest groups have become far better informed and more sophisticated, both in terms of

[138] *See* Stewart in Harter (1982:16-17).

[139] Although, as Wald (1985) has pointed out, the strength of judicial review in the United States has since declined and new questions regarding the role of the courts with respect to negotiated rulemaking have arisen.

assembling information and demanding that their views be taken into account. As a consequence, regulatory agencies have experienced increasing pressure from an informed and politically active public to be included in the drafting of both policy and regulations. However, at the same time, the technical, socioeconomic and scientific knowledge (both within government agencies and in the private sector) has not been able to keep abreast of the complex issues involved in regulatory decisions.

According to Harter (*Ibid*.:17), this situation

> . . . has resulted in a crisis of legitimacy that is the current malaise. Agency actions no longer gain acceptance from the presumed expertise of its staff. It is no longer viewed as legitimate simply because it fills in the gaps left by [the legislative branch], or because it is guided by widely accepted public philosophy. To the extent that rulemaking has political legitimacy, it derives from the right of affected interests to present facts and arguments to an agency under procedures designed to ensure the rationality of the agency's decision.
>
> Political decisions necessarily have no purely rational or "right" answer. Yet, the current regulatory procedures do not permit the parties to participate directly; to share in reaching the ultimate judgment, which is what provides the legitimacy to political decisions.

The question arising out of this situation is: What kind of decisionmaking structure and procedures would be best suited to address the inherently political nature of regulatory decisionmaking? Given the limitations of and dissatisfaction with public hearings (which can be highly adversarial) and consultations (which do not permit direct interaction among the interested parties),[140] one answer has been regulatory negotiation. Regulatory negotiation addresses the political need for legitimacy by providing for public participation in the decisionmaking process, and introduces a procedure whereby dialogue among interest groups may resolve issues that cannot, and ought not to, be settled solely by research and scientific predictions or by unilateral attempts to influence the "umpire"; that is, the regulatory authority.[141] Thus, regulatory negotiation has emerged as an alternative, although supplementary, method of rulemaking which, it is claimed, provides the political and substantive legitimacy lacking in conventional methods.

3.1.2 Other Jurisdictions

While the historical progression of events underlying the development of regulatory negotiation in the United States is not found in Canada's history, the issues involved are similar and are relevant to many jurisdictions' regulatory activities in today's world. As mentioned above, the two major issues relate to the basis for decisionmaking when the matter is too complex to be satisfactorily determined by "technocratic

[140] Harter *Ibid*.:18-24.

[141] By "ought not" it is meant that these methods are inappropriate for making fundamentally political, essentially legislative choices.

rationality" alone,[142] and the increasing demand for public involvement in these kinds of decisions.

Different countries display a range of government "postures" in regulatory decisionmaking. Great Britain, like other commonwealth countries, is portrayed as having developed a benign regime (in contrast to American litigiousness) based on "gentlemanly" consultation and negotiation; although it is noted that the negotiations involved are generally "behind closed doors" and do not necessarily enfranchise all affected stakeholders.[143] Moreover, it has been argued that the British model is a fragile one that may not be able to withstand the importation of adversarial attitudes that accompany the location of international/American businesses within its jurisdiction and the subsequent need or demand for greater involvement of the affected parties in regulatory decisionmaking.[144]

Scandinavian countries such as Sweden, on the other hand, being far more homogeneous than Canada, the United States and Britain, appear to have experienced very little pressure to seek alternatives. In fact, in Sweden, rulemaking seems to have followed a regime of consultation and negotiation before the development of a regulation that is somewhat similar to regulatory negotiation. Regulatory policy is developed through the creation of a "blue-ribbon committee" (comprising members of the opposition party, members of "officially recognized" stakeholders, representatives from the government secretariat, and representatives from the regulatory agency), which drafts the regulation on the basis of consensus decisionmaking. The draft regulation is then published and comments are received from the public, which may be used to revise the regulation. The final regulation may be challenged in court and is thus subject to judicial review; however, the frequency with which this happens is far less than in the United States. While it can be deduced that some of the elements of the reg neg process are present in the Swedish model, it is also appears that full public participation in the regulatory decisionmaking process is limited.[145]

The State of Victoria, Australia, on the other hand, has pursued a strategy involving rigorous consultation to permit public participation in regulatory decisionmaking and to improve the basis on which these decisions are made. As discussed later,[146] the Australian approach differs from conventional consultative strategies in two respects: it is legislatively mandatory and enforced, and the RIAS requirements are more comprehensive, thereby avoiding the "black box" nature of regulatory decisionmaking that has been ascribed to Canadian methods. It is also possible to detect an increase in the use of mediation and other ADR techniques in various individual statutes authorizing regulatory action that have been recently amended.[147]

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[142] Professor Daniel Bell in Harter 1982:7, note 31.

[143] Braithwaite 1987.

[144] Braithwaite *op. cit*.

[145] Conversation with Mr. S. Marling, Consul General of Sweden, March 9, 1993.

[146] *See* Section 3.7.3.2 on Australia's *Subordinate Legislation Act* near the end of this chapter.

[147] *See*, for example, Marks 1989 and Bennett and Quinlan 1989.

3.2 Incentives for Participation

3.2.1 BATNAs: Best Alternatives to a Negotiated Agreement

Parties must believe that they will benefit from negotiating a regulation before they are likely to participate in good faith.[148] As Harter (1982:43) points out, no party will agree to use any forum to reach a decision in which it is interested unless, all things considered, it believes it is more likely to achieve its overall goals by using that process instead of some other available decisional process. This observation has been translated by Fisher and Ury (1981) to mean that a party to a negotiation will be guided by the party's "best alternative to negotiated agreement" (BATNA): if a party's BATNA offers more promise than negotiation, the party is unlikely to participate.[149]

Often, parties' perceptions of their best alternatives are determined by what the regulatory authority will do in the absence of a negotiation. Depending on the alternatives available to them to persuade the ministry or agency to conform to their desired objectives, different parties will have different BATNAs. For example, some very powerful interest groups may perceive that they have a superior strategy in lobbying the government for the desired regulatory outcome, whereas some less powerful interests may perceive the likelihood of influencing the government through lobbying to be minimal. In other words, parties' willingness to participate in negotiations may be affected by their perceptions of their leverage with respect to the regulatory agency or superior authorities.

Perritt (1986:1637) has suggested that these observations may be summarized in this hypothesis: parties will negotiate only if they perceive the outcome of unilateral agency action to be worse for them than what is attainable in the negotiation. This hypothesis has three corollaries. Regulatory negotiations are more likely to be successful if the parties agree on what the outcome will be in the absence of negotiations; if the parties disagree on what the outcome will be in the absence of negotiations and are all pessimistic rather than optimistic;[150] and if the agency actively influences party perceptions of BATNAs, emphasizing to each party the undesirable consequences of unilateral agency action in terms relevant to each party, thereby making the prospect of negotiation more attractive.[151]

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[148] Although as the discussion in the section, Drawbacks, in Chapter 1.0 indicated, parties may be willing to participate in bad faith, as a delaying tactic or to increase political leverage.

[149] *See* the British Columbia Round Table report (Volume 1, 1991:15). Mr. Chris Kirtz (United States EPA) has suggested that the obverse of BATNA is also relevant: i.e., WATNA (worst alternative to a negotiated agreement) refers to the perception that without negotiation, the results could be very unfavourable. It is noted that BATNAs are crucial to the effectiveness of regulatory negotiation in the sense that parties must come to the table voluntarily, based on a decision that this approach offers them a preferred method of pursuing their interests. Conversation with Judge Barry Stewart, May 11, 1993.

[150] For example, it has been pointed out that parties to a proposed rulemaking may not be sure of their BATNAs and this uncertainty may help bring them to the negotiating table (Susskind and McMahon 1985:153).

[151] As Perritt (1987:878) points out, the need for favourable BATNAs was the motivation behind paragraphs 1 and 2 of the ACUS Recommendation 85-5; *see* the section, Criteria, in Chapter 2.0.

3.2.2 Other Incentives

Some incentives derive from the perceived benefits of regulatory negotiation described in Chapter 1.0. Although some incentives are negative (fear of the unknown, uncertainty), others may be positive. It has been observed that, unlike the United States, Canada is in an advantageous position for regulatory negotiation because far fewer regulations are challenged in court. This situation provides an additional incentive because it contributes certainty to the process: agreements are more likely to be implemented; providing, of course, the regulatory agency adopts the negotiated regulation.[152] There is also an incentive deriving, in some part, simply from the appeal of regulatory negotiation itself, insofar as stakeholders like the idea of having greater control over the content of a regulatory decision and as the agreement reached will be based on consensus.[153] It is interesting to note in this regard that while parties may have differential power relations outside negotiations, the skill of the negotiators at the table can equalize power disparities.[154] As well, depending on the situation, the fact that the facilitator of the negotiating committee is a third-party neutral (as opposed to a representative from the ministry) may also be seen as a positive incentive.[155]

Further incentives result from the fact, as noted in the discussion of benefits, that stakeholders often spend a great deal of their resources trying to influence agency decisionmaking. Susskind and McMahon observe that many stakeholders complain that the notice-and-comment process does not occur until after the ministry or agency has already committed itself to a course of action. Accordingly, the offer of regulatory negotiation is often very attractive to these stakeholders.[156]

The fact that participation is voluntary, and yet the consensus agreement is binding, is also seen as an incentive.[157] Participants are free to walk away from the negotiating table at any time. Moreover, if the negotiations fail to reach a consensus decision, parties can pursue their other options (e.g., lobbying, litigation). However, as noted in Chapter 1.0, if a consensus agreement is reached, parties normally are bound to proceed with the proposal, thereby lending certainty to their negotiation efforts.

Other incentives have been suggested. For example, in Canada there is always a backlog of regulations up for review by the Regulatory Affairs Secretariat. If the government were to offer to consider negotiated regulations before other regulations, it

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[152] Conversation with Mr. Lee Doney, Executive Director, British Columbia Round Table, April 13, 1993.

[153] *See* the discussion regarding consensus decisionmaking in Section 1.2, Chapter 1.0. *See* also Harter 1986:58.

[154] Susskind and McMahon 1985:725. As discussed below, training can assist in this regard. In addition, access to the resources developed for the negotiations in terms of the information available and technical advice also helps to even up some of the sharp disparities in the availability of financial resources and has provided, in some applications, assurances to even the least well-to-do groups that their representatives would be able to cover the costs of participating in the meetings. Susskind and McMahon go on to describe how power in negotiations is quite fluid depending on the strategies used and the coalitions formed. As well, it is not uncommon to find that a momentum toward consensus holds some of the more recalcitrant groups in check. (*Ibid*.)

[155] Conversation with Mr. Lee Doney, Executive Director, British Columbia Round Table, April 13, 1993.

[156] In conversations with Canadian spokespersons, it was generally thought that industry would find the process attractive because it would save time and money, or, as Ms. Young expressed it, it would save time which is money. On the other hand, a couple of respondents noted that industry might not have the resources to participate effectively.

[157] *See* Perritt 1986:1659. It has also been suggested that if all parties have been afforded the opportunity to participate and have refused, they should be bound by the outcome (written comment by Mr. Peter Ford, Canadian Standards Association, August 4, 1993.)

could encourage parties to engage in regulatory negotiation.

It has also been suggested that one of the most convincing incentives may be good examples of situations in which regulatory negotiation has worked.[158] Two conditions are required for utilization of this incentive: first, the negotiations must be documented and widely publicized; second, stakeholders must be made aware of these cases and how they worked.[159] Associated with this incentive is the advice that the process would benefit from greater leadership, both in a general sense (e.g., support from federal ministries such as the Department of Justice Canada and the Regulatory Affairs Secretariat), and with respect to the particular regulatory ministry or agency involved.

In discussions with Canadian spokespersons, a repeated theme was the need for official endorsement of the process by the federal government. One of the chief obstacles to the use of regulatory negotiation could be fear and resistance on the part of government officials. Accordingly, it is necessary to familiarize agency officials with the benefits of the process and to emphasize appealing incentives for their participation.[160] This could take a number of forms, including increased dialogue about the process, workshops, and either formal legitimization of the process through the creation of supportive legislation or strong policy directives. In addition, the process requires the support and endorsement of regulatory ministers, who often may have to overcome their fear of this method of developing regulations.

3.3 Key Actors

3.3.1 Agency Participation

There are various kinds of agency or ministry participation in regulatory negotiation. Harter (1982), for example, recognized implicitly two forms of negotiated rulemaking: one in which the agency participates in the negotiations (Agency Participation Model) and another in which it does not (Agency Oversight Model). Although ACUS recommendations 82-4 and 85-5 favour agency participation,[161] Perritt (1987:621) comments that there may be times when the parties might be motivated so strongly to negotiate a resolution of their disagreements that agency participation would

[158] Susskind (1986:6), for example, observes that "[t]he key obstacle to more widespread use of assisted negotiation in the regulatory process is disbelief. Elected and appointed officials do not believe that they will be better off if they advocate negotiated approaches to regulation. It must be stressed repeatedly that everyone in an assisted negotiation has a veto, including the elected and appointed officials with the formal authority to decide . . . Many advocates of particular interests don't believe that they will be able to `do as well' in a formal negotiation as they will in either court proceedings or `behind the scenes'. They are the only ones who can make such judgments. I would point out, though, that many of the participants in recent assisted negotiations at the state and local levels have become strong advocates of continued use of such processes. They have found that the presence of a trained intermediary, the opportunity to engage in joint fact-finding, the ability to trade across a range of issues in an open forum, and the option of walking away at any point have produced outcomes that exceeded their expectations."

[159] *See* Ontario Round Table 1992a:19-23; also conversation with Mr. Lee Doney, Executive Director of British Columbia Round Table, April 13, 1993.

[160] Conversations with a number of Canadian spokespersons.

[161] ACUS recommendation 82-4, paragraph 8 states: "The agency should designate a senior official to represent it in the negotiations and should identify that official in the FEDERAL REGISTER notice." Similarly, ACUS recommendation 85-5, paragraph 1, states: "An agency sponsoring a negotiated rulemaking proceedings should take part in the negotiations. Agency participation can occur in various ways. The range of possibilities extends from full participation as a negotiator to acting as an observer and commenting on possible agency reactions and concerns. Agency representatives participating in negotiations should be sufficiently senior in rank to be able to express agency views with credibility."

actually be unnecessary. Perritt, like others, however, states that in most cases the agency should be represented on the committee and should ask questions: try to obtain information from participants, gain substantive knowledge, and determine areas in which compromise may be possible. Experience suggests, however, that the agency should avoid directing the participants towards one result or another, since that kind of participation can stifle debate.

The importance of agency participation is underscored by the fact that of the negotiated rulemakings undertaken by EPA, the two that failed to reach an agreement did so, it is claimed, because of a lack of adequate agency participation.[162] Perritt observes that participation by the agency (and by the Office of Management and Budget (OMB), which may be compared with the Regulatory Affairs Secretariat of the Treasury Board of Canada) reduces the risk of parties undermining the process by making "end runs" to the agency or to OMB. Similarly, Thomas (1987) comments that coordination within the agency and with OMB is more critical in negotiated rulemaking than in conventional rulemaking because the negotiating committee must be confident that the agency negotiator is speaking for the federal government. This coordination process must keep up with (and not delay) the negotiations; if federal agencies delay the negotiations in order to coordinate, they can hardly expect other participants to stick to established schedules.[163] In conventional rulemaking, OMB review normally takes place after the agency has developed, but before it has published, the proposed or final rule. In negotiated rulemaking, the agency's commitment to using proposed regulations based on consensus decisionmaking means that the consultation with OMB (Regulatory Affairs) must take place during the negotiations. OMB analysts have been present as observers at many American negotiated rulemaking sessions but they usually have not taken part in the discussions.

Moreover, Perritt notes that agency participation provides an opportunity for greater access to the agency than some parties might normally have within conventional rulemaking methods. As well, agency participation increases the likelihood that the agency (and Regulatory Affairs) will support and understand the basis of negotiated proposals. Finally, it is observed that the participation of the agency broadens the range of options available regarding consensus.[164]

It has been recognized, of course, that agency participation may present some problems; however, Harter (1982:63) claims that with proper planning and guidance, these difficulties can be resolved. Given the fact that the agency is ultimately responsible for the acceptance of the negotiated regulation, some parties may view the agency representative as a "special interest" and accord it an unusual status involving posturing, advocacy of extreme positions, and so on, to preserve their position in the event the negotiations break down. A second problem may arise if consensus is not reached and the agency misuses the concessions and compromises made during the negotiations, as well as the data submitted during the process. Thus, the parties may be reluctant to be

[162] Perritt 1987:20. *See* also Osherenko (1989:12-13) for her account of the partial failure of the Bering Sea negotiations in which the government representatives did not participate; and Smith 1993:39. For the most part, the importance of agency participation was emphasized by spokespersons interviewed for the present study.

[163] A similar point, based on experience, was made by Ms. Wendy Frances.

[164] Harter (1982:60-63) discusses the difficulties that may arise if the agency does not participate.

forthcoming and flexible, and thereby impair the effectiveness of the negotiations.

As noted in Chapter 2.0, agency participation should be backed by adequate consultation between other agencies implicated in the proposed rulemaking: either other federal agencies or provincial ministries. Alternatively, these additional agencies or ministries may participate in the negotiations. Often, for example, another agency is responsible for the enforcement of an agency's regulation (Canada, Department of Justice, 1993). In addition, it was found, for example, that without inter-agency communication, a successful negotiation of a standard for chlorine usage was concluding when it was learned that another agency was considering an outright ban on the substance.

Perritt (1987), in his review of the negotiated rulemaking process used to develop a proposed OSHA health standard, observed that there is an inherent tension between the ad hoc nature of negotiated rulemaking and the orderly management of a regulatory program. As a consequence, he states that agencies ought to not only support development of sound and stable management and organizational procedures but also should recognize the value of negotiated rulemaking as an alternative to traditional processes. Accordingly, institutional mechanisms should be found that are hospitable to the ad hoc nature of negotiated rulemaking, while minimizing the disruption to accountability, chain of command, and orderly resource planning and allocation with the ongoing components of a regulatory department.[165]

Harter (1982:66) notes that the agency representative, like his or her private-sector counterpart, should be a senior official who is informed about what the agency's ultimate position is likely to be, and is part of that section of the agency responsible for the rulemaking, so that he or she has substantive knowledge of the issues involved. As well, it is important that the agency's lawyers be involved early in the consensus decisionmaking so that the proposed regulation will conform to any legal requirements and can thus be accepted by the agency. Accordingly, it is important that the agency representative have sufficient stature to permit him or her to draw on the agency's resources and coordinate its various concerns as she or he would if the regulation were being developed by the agency's own staff. If, for some reason, agency (or Regulatory Affairs) participation in the negotiations is not acceptable to other parties, the facilitator or third-party neutral should serve as a channel between the negotiations and the government agencies.

3.3.2 Private-sector Participation

As outlined in Chapter 2.0, the participation of *all* affected parties is essential to regulatory negotiation.[166] The representation of affected interests is not only critical with respect to the quality and acceptability of the agreement reached, but is also constitutionally required, as Jackman argues, under section 7 of the Charter "at least with respect to those regulatory decisions that have implications in relation to life, liberty or

[165] *See* Perritt 1987:39-40 for an example of some recommendations about how an agency could reorganize in order to respond adequately to a negotiated rulemaking.

[166] Harter 1982:52ff.

personal security."[167]

Harter (1982:53) cautions that careful judgment must be used to determine which interests are so central that the regulation could not be developed without their participation. The Law Reform Commission of Canada (1986:114) comments in this regard that "[W]ho participates in the process of decision making . . . is not answered by simply asking who may be affected by the decision (i.e., the issue of fairness). The question must also be asked: who has useful information and insight to contribute to the decision and can the participation of the person be justified in the light of the capacity of the process to fulfil its government goals?"[168] Alternatively, Harter suggests that the more immediate way of determining interested parties would be to have the parties themselves make the decision. Those interests that are only remotely affected may have their participation restricted to written comments or other limited means. The interests involved in a negotiation may either expand or contract as work progresses. Consequently, the interests represented may also have to change over the life of the negotiations. Flexibility may be required to permit the addition of new parties.[169]

As with representation from the agency, private-sector representatives should be senior members of their organizations.[170] Each party selects its own representative (and an alternative, if appropriate[171]) who has knowledge of the subject matter and, if possible, experience in policy deliberations. It is important that participants be of equal authority to make decisions for their organizations and be likely to remain powerful and influential during and after the negotiations.[172]

3.3.3 Mediators or Facilitators

Mr. Gerald Cormick, an experienced practitioner of negotiation in the environmental area, has defined negotiation as: ". . . a voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediator [does] not [have] the authority to impose a settlement. His or her strength lies in the ability to assist the parties in resolving their own differences. The mediated dispute is settled when the parties themselves reach what they consider to be a workable solution."[173]

Usually, the negotiation meetings need to be managed very efficiently owing to

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[167] Jackman 1990.

[168] A rough rule of thumb regarding the identification of interests that should be included in the negotiations entails identification of all those who would support the regulation and, in addition, all those who could oppose it and stop regulatory action from happening. Conversation with Judge Barry Stewart, May 11, 1993.

[169] Conversation with Judge Barry Stewart, *supra*.

[170] Although in practice there has been some variation in the type of representation, with some private-sector parties employing lawyers to represent their interests, it has been recommended that wherever possible senior officials of the organization should sit at the negotiating table. Conversation with Judge Barry Stewart, May 11, 1993. It is recognized, however, that this may be difficult under some circumstances; e.g., when the parties involved may be international corporations with their head offices and decisionmaking apparatuses located in another country. *See* Janisch 1989.

[171] For example, in Chapter 2.0 it was noted that in some negotiations it may be necessary to create subcommittees or caucuses in which case alternative representative may be required.

[172] Osherenko 1989:22.

[173] In Marcus et al. 1984:216.

the relatively large number of issues and parties and the generally short period of time for reaching agreement. The assistance of an experienced mediator or facilitator can assist the parties in this process. ACUS recommendation 82-4, paragraph 10, advises that the convenor and the agency *might* consider whether selection of a mediator is likely to facilitate the negotiation process. Where participants lack relevant negotiating experience, a mediator may be of significant help in making them comfortable with the process and in resolving impasses. However, ACUS recommendation 85-5 urges that after further experience with the process, mediators be used in virtually all rule negotiations.[174]

It has been suggested that the third-party neutral will normally prepare an agenda to be sent to the participating parties prior to the meetings; ratification of the agenda should be the first order of business at each meeting. The third-party neutral is then responsible for ensuring that the meeting is kept on schedule or for calling for adjustments to the schedule if necessary. The third-party neutral is also responsible for keeping a list of committee items and issues so that each party can see the meeting's progress.[175] In addition, a skilled mediator or facilitator will help the committee recognize when a break, caucus or subcommittee meeting is needed. As well, a skilled facilitator may often change the "chemistry of the interaction" among opposing parties to resolve conflict.[176] Finally, a mediator can also recognize when consensus has been reached, even though discussion of positions may be continuing.[177]

The Administrative Conference of the United States advises (1990:103) that the careful selection of a qualified third-party neutral is crucial to the success of the negotiations. Each stakeholder must have confidence in the mediator's skills and in his or her neutrality.[178] Often, the convenor, if drawn from outside the agency's rulemaking division, will have established the necessary trust and rapport with the parties during the convening process and will have acquired considerable familiarity with the issues involved, thereby making him or her the best choice as a single mediator or as a member of a mediation team. Perritt (1987:884) observes that there are advantages and disadvantages to outside and inside facilitators. In contrast with the advantages noted above, inside facilitators may not be the best choice insofar as they could be inhibited in dealing with intra-constituency problems and in intervening with other government agencies (e.g., Regulatory Affairs).[179] As well, private parties may be reluctant to accept the neutrality of a facilitator from within the agency.

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[174] Perritt 1987:884, note 89.

[175] Administrative Conference of the United States *Sourcebook* (1990:181) notes that often the meeting recorder assists the mediator by using a large display (blackboard, overhead projector, etc.) to display agendas or items under discussion, the issues and their resolution. A separate recorder may be taking minutes or keeping track of changes in draft document language.

[176] Osherenko 1989:22.

[177] Administrative Conference of the United States *Ibid.* Perritt (1987:884) reports that "[V]irtually all of the participants in the four completed rule negotiations [that he discusses] agreed that the mediators made essential contributions to the process. In fact, it is difficult to conceive how any of the four negotiations would have worked at all without the help of the facilitators/mediators. All three agencies used both convenor and mediators. In some cases, the convenor became the facilitator or mediator. In other cases, the facilitator or mediator was a different person from the convenor. Despite differences in styles, the involvement of the facilitator/mediator was essential to keep the negotiations moving. Few participants or observers thought that mediators ought to originate from any particular source; rather, they emphasized the importance of mediation experience and competence. Mediation skills involve more than an ability to work well with people they involve an instinctive awareness of group functioning and how to move toward closure."

[178] *See* Hoffman 1990:68-69.

[179] Perritt goes on to discuss some intra-constituency problems, 1987:885-888.

The Administrative Conference of the United States maintains a roster of dispute-resolution neutrals. In Canada, there are a number of private-sector organizations that provide these services. The Ontario Round Table report (1992a:25-26) recommends that:

> To facilitate the use of various methods of conflict resolution by private parties, the Ontario government should establish the framework, such as a mediation centre or agency, to serve as an independent government body. As such it could provide:
>
> a) public education regarding dispute resolution techniques;
>
> b) training of public employees in consensual resolution;
>
> c) a forum for conflict resolution processes to take place;
>
> d) a registry of available mediators;
>
> e) research into further development and refinement of such techniques;
>
> f) a coordinating role for the dispute resolution specialists in each of the concerned ministries, agencies and boards.
>
> Such a mediation agency would be publicly, and perhaps privately, funded; although the neutrality and independence of its employees should not be compromised. The agency would act under its own code of ethics and be publicly accountable.

Perritt (*op. cit.*) comments, however, that mediation skills are highly personal, and it would be unwise to establish any exclusive institutional source of rulemaking mediation services. On the other hand, it may be advisable, he claims, to organize training and educational programs and to procure mediation services competitively to ensure that opportunities for potential neutrals are distributed equitably.

3.3.4 Role of the Media

According to American administrative law, meetings should be open to the public.[180] Nevertheless, the Administrative Conference of the United States observes that in some situations, the committee members may wish to exclude the public (e.g., when the information being discussed is confidential). Thus, ACUS recommendation 82-4, paragraph 12, suggests that the negotiating group should be authorized to close its meeting to the public only when necessary to protect confidential data or when in the judgment of the participants, the likelihood of achieving consensus would be significantly enhanced.

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[180] United States *Administrative Procedure Act* and *Federal Advisory Committee Act.*

Perritt (1986:1639) comments that the "give and take" process involved in negotiations should be protected from fragmentary or inaccurate reports of positions taken, which could endanger the proceedings. He notes, however, that the choice between open and closed meetings also has some implications regarding the relative power of different kinds of interest representatives. For example, public-interest groups frequently compensate for small financial and staff resources by mobilizing the media to influence public and government opinion. It is easier to obtain this mobilization when the meetings are open to the media. Based on her evaluation of the Bering Sea negotiations, Osherenko (1989:24) states that generally, the media should be excluded because their presence may assist some parties more than others and may encourage strategic behaviour in a process designed to maximize cooperation and joint gains. Usually, she claims, the presence of the media inhibits frank discussion and encourages posturing.[181]

3.4 Training

This section considers two kinds of training: training of interests' representatives at the negotiation table, and training of neutrals.

3.4.1 Orientation and Training of Participants

As noted previously, participants in a regulatory negotiation may not have had much experience in the negotiation process, particularly the kind of "principles negotiation" recommended for this process.[182] As a result, most of the negotiated rulemakings in the United States have begun with a pre-negotiation training and orientation session for participants. The Administrative Conference of the United States points out that these sessions have the following major objectives:

- To augment and update the negotiation skills of the participants.
- To allow the participants to become acquainted with each other in a neutral setting and to begin to build a constructive relationship among themselves.
- To demonstrate consensus-building techniques with nonthreatening examples in the form of demonstrations, exercises or simulations.
- To allow the mediator(s) to observe the dynamics of interactions among members of the group.
- To provide a common vocabulary and procedures for operating

[181] The Administrative Conference of the United States *Sourcebook* (1990:195) gives examples of some of the protocols that have been developed with respect to the media. In some Canadian instances, it has been found that the media have impaired the negotiation process.

[182] *See* Chapter 2.0, Section 2.3, Stage 3: Negotiation. It has been observed that these kinds of negotiations are much more difficult than adversarial litigation, requiring skills that many people are not familiar with using. Conversation with Judge Barry Stewart. Mr. Glenn Sigurdson observed that unless public officials feel comfortable with the process and are confident about how to use the new procedures, the method could be discredited before it has really been given a chance especially if agency officials are resistant to the process in the first place.

consensually.[183]

Although some agencies were initially reluctant to provide a training session because they feared that participants would feel their competence was in question, they have found that once the sessions are offered, the parties choose to attend and report that the orientation is valuable and perhaps essential.

Commonly, the sessions provide short lectures on negotiation, and demonstration or role-playing exercises, usually based on the aforementioned "principled negotiation" techniques developed by Fisher and Ury.[184] The lectures commonly address such topics as BATNAs, interests versus positions, and maximizing joint gain ("win/win" rather than "win/lose").[185]

Because training sessions have proved so beneficial to participants, the Administrative Conference, in its recommendation 85-5, paragraph 4, has advised that the agency should consider providing the parties with an opportunity to participate in a training session in negotiating skills just before the beginning of the negotiations.

The Ontario Round Table (1992a:19-20) also considers training to be an important component of consensus methods.[186] The report suggests that training for government personnel in the skills and benefits of ADR techniques could be either obligatory or simply recommended, while private companies could be strongly encouraged to provide similar training. Thus, the Ontario Round Table recommends that each relevant agency, board or ministry should provide training on a regular basis for the dispute-resolution specialist and for other employees involved in the implementation and operation of the dispute-resolution policy.

3.4.2 Training for Neutrals

The Ontario Round Table report (1992a:25) recommends that "[T]he Ontario government should establish professional standards for third party neutrals on issues such as experience, training and conflict of interest. Parties to a given dispute need not adopt these standards for their chosen third party, but these guidelines should be made available."

Although Canadian law schools and bar associations recently have shown increased interest in ADR techniques, including negotiation, it does not appear that there has been as much development in this area as in the United States (notably, Harvard's Negotiation Project). Nonetheless, training courses are available from a variety of

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[183] Administrative Conference of the United States *Sourcebook* 1990:161.

[184] *See* Chapter 2.0.

[185] It is interesting to note in this regard that there is the potential for some misunderstanding about what "win/win" means in practice. Ms. Wendy Frances and Mr. Glenn Sigurdson, for example, have pointed out that in most cases the only "win/win" outcome is in relation to what the alternatives would have been. As noted in the section, Unintended Consequences of Regulatory Negotiation, in Chapter 4.0, it is important that participants understand this to avoid creation of false expectations.

[186] *See* also Craven (1990:268) who reports that the institution of the Victorian legislation (see Section 3.7 of this chapter) suffered in its initial implementation stage owing to a lack of adequate training for government personnel.

sources (some of which offer accreditation), including (to name only a few) the Arbitration and Mediation Institute of Ontario, Inc. (a not-for-profit, private corporation offering courses through the University of Toronto); New Directions Group at Carleton University, Ottawa;[187] the Conference Board of Canada, Ottawa (Mr. Brian Hull); the Canadian Institute for Conflict Resolution, Ottawa;[188] as well as within various law schools' curricula.[189] [190]

3.5 Funding

As noted in Chapter 1.0, while the long-term savings derived from regulatory negotiation may be large, in the short term the process can be expensive. Adequate funding has a number of implications: it can affect the ability to organize and the quality of public advocacy groups' participation;[191] the establishment of a resource pool (e.g., for the hiring of expert, neutral consultants, undertaking research); the capacity to hire qualified third-party neutrals; and the costs associated with more logistical problems such as travel and hospitality.

As Jackman (1990:42) points out, meaningful participation can be expensive. She refers to Le Forest's comments:

> . . . If we are to look at participation as not just a public relations exercise but as a useful way for agencies to obtain information about all relevant interests so that their decisions may be acceptable and sound, then some means must be found to finance it. Otherwise, only those who have the financial means are represented, an undemocratic situation that is the antithesis of the underlying rationale for public participation.

Jackman goes on to observe that what makes this situation especially troublesome is the fact that regulatory policy-making in Canada is premised on a pluralist model (as is reflected, she claims, in the federal government's Regulatory Reform Strategy, 1986).

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[187] Dr. Glen Toner, Professor of Sociology, Carleton University. Conversation with Mr. Brian Hull, April 3, 1993.

[188] Conversation with Mr. Robert Birt, March 8, 1993.

[189] A brief examination of some of the literature available from these sources suggests, however, that the concept of regulatory negotiation in general and the ideal of "principled negotiation" in particular have not as yet been assimilated into these courses. *See*, for example, the Law Society of Upper Canada report (1993). In response to a survey conducted by the Law Society of Upper Canada, one respondent noted that: "[T]he education recommendations of your Committee are fine as far they go. However, they do not address the current problem that there is no ready training for arbitrators and mediators. Being a neutral is not the same as being an advocate. At the moment, for a non-labour dispute, there is a very small pool of available neutrals most of them ex-judges. What is needed is a course of training that is available to experienced counsel with an inclination towards being a neutral. The Harvard CLE intensive training courses are one of the few training options, but they are small, infrequent, and very short duration. There is a half course at University of Toronto, but by all reports it is just not adequate to the task. There also has to be type of apprenticeship . . . We are in the anomalous position in Ontario of having a new and very flexible Arbitration Act and Commercial List Rules that enable ADR, and whole areas of law, such as environmental law, which cry out for non-court solutions. Yet we have no non-labour pool of neutral talent that is known throughout the profession and to the public as being skilled at ADR techniques . . . ." Along similar lines it has been observed that in Canada, there are not many skilled neutrals. Conversation with Judge Barry Stewart, May 11, 1993.

[190] In Australia, the Australian Commercial Disputes Centre (ACDC) was formed in 1986 and the "Lawyers Engaged in Alternative Dispute Resolution" (LEADR) was formed in 1987. Both LEADR and ACDC have training schools for mediators and are actively involved in the furtherance of ADR. ADR has also spawned its own journal in Australia: *The Australian Dispute Resolution Journal. See* Pengilley 1992.

[191] The EPA found that this problem can become particularly acute when an organization is asked to participate in several negotiations, because its resources tend to become severely strained by the second or third negotiation. Administrative Conference of the United States *Sourcebook* 1990:237.

Consistent with an image of the state acting as a neutral arbiter of competing interests,[192] the regulator is expected to ascertain the public interest as it emerges from a competition of views expressed by the various individuals and groups who may be affected by the regulatory decision. Referring to the numerous allegations of agency capture, Jackman states that it follows that the current regulatory process is inherently distorted insofar as it assumes participation where participation is in no way guaranteed, and notes that this is not only unfortunate in the ordinary policy context, but is constitutionally unacceptable once a section 7 (of the Charter) interest is taken into account.

Accordingly, Jackman argues that a failure to provide the funding necessary to ensure such access to regulatory decisionmaking amounts to a denial of participation, and renders fundamentally unjust the regulatory decision that is ultimately reached. She observes that various suggestions have been made to reduce the barriers to participation in the Canadian regulatory process, including government funding of public-interest groups, cost awards by regulatory agencies for participation in regulatory proceedings and intervenor loans.[193] Harter (1982:57) notes that alternative funding has come from private foundations.

There is, however, some debate over the source of funding. With respect to funding by regulatory agencies,[194] Hartle and Trebilcock (1982:660), for example, comment that there are real dangers that the political independence of groups funded this way will be compromised by dependence on the continuing good will of the government in sustaining them. Secondly, they point out that a full diversity of viewpoints reflecting major thinly spread interests may not be encouraged by this mechanism because the government may only be disposed to fund those groups with views congenial to it. Thirdly, because group grants are allocated to organizations and their representatives (and not to individual members), it is difficult to ensure that funds are spent by organizations to represent their members' views rather than those of the alleged representatives; that is, constituency accountability is attenuated under this form of funding. Accordingly, Hartle and Trebilcock suggest that an alternative form of funding should be considered: tax incentives. Where tax incentives are inappropriate for logistical reasons, the authors suggest that they could be supplemented by increased intervenor funding.

The Ontario Round Table report (1992a:20) refers to three sources of funding: direct grants similar to intervenor funding; the establishment of dispute-resolution centres; and creation of a negotiated investment strategy (NIS) as has been developed in the United States, which basically involved initial funding from a private foundation.

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[192] *See* the section, The Underlying Rationale for Regulation Negotiation, *supra*.

[193] *See* also Salter 1982:493; and Hartle and Trebilcock 1982:659-660. In an interesting analysis of hearings conducted under the *Environmental Assessment Act*, Dick (1990) argues that the prolonged nature of these hearings is partly the result of the interpretations of who may qualify for intervenor funding under the Ontario *Intervenor Funding Project Act*, 1988. Dick claims that, owing to a narrow interpretation of "public interest", the *Intervenor Funding Project Act* has become a tool for NIMBY (Not In My Back Yard) groups to fund their interventions. Dick questions whether it was ever the intention of the drafters of this Act to protect interests of so narrow a group at so great a cost (including not only monetary costs but also costs resulting from the delay of beneficial projects) to the public as a whole. While this particular problem should not arise in the context of regulatory negotiation owing to the fact that deadlines are critical to the effectiveness of the process, it is mentioned to illustrate the care that may be required in providing funding, and the terms of the funding particularly since it is recognized that some groups may be motivated to use the process for their own ends rather than in the "spirit" for which the process is intended.

[194] According to Hartle and Trebilcock, in 1982 the federal Department of Consumer and Corporate Affairs allocated almost $1 million a year to consumer groups, a significant portion of which is spent on representational activities.

While agencies in the United States, such as the EPA, have funded, in large part, the neg reg processes that have been undertaken there, a preferred approach, where possible, may be to create a pooled fund (for the services of technical consultants, research, and so on) to which all stakeholders might contribute some portion (perhaps based on an ability-to-pay basis) but permitting equal access because it would be used for the benefit of the entire negotiation committee.[195]

In short, it is recognized that the neutrality of funding is critical to the reg neg process. Thus, the Ontario Round Table (1992a:26) recommends that:

> To encourage the use and acceptance of alternative forms of dispute resolution, the Ontario government should establish a fund to assist eligible parties to participate in a consensual resolution process. To maintain the neutrality of the third parties involved in the process, financial assistance should not be specifically earmarked but dedicated to any of a specific number of costs, such as helping to defray the expenses of a private mediator or expert witness, or providing money for technical research.

As well, adequate funding must be provided to ensure that negotiators can afford to keep in touch with their constituencies; as noted earlier, constant feedback between the negotiator and his or her constituency makes for a better result and secures the future endorsement of the agreement.[196]

3.6 Other Applications of the Reg Neg Process .6 Other Applications of the Reg Neg Process[197]

Although (as noted in Chapter 1.0), regulatory negotiation is a procedure developed as a supplement to conventional *rulemaking* procedures, it has been recognized that the negotiating process is amenable to a variety of other applications. The reg neg process is perceived to be part of an array of alternative dispute resolution (ADR) techniques that may be used to augment conventional methods of resolving differences or disputes in a variety of situations.[198]

Among potential additional applications of the reg neg process, the following have been either suggested or already undertaken: policy development, standard-setting,

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[195] *See*, for example, British Columbia Round Table report (Volume 2, 1991:6), and Administrative Conference of the United States *Sourcebook* 1990:236. In conversation with Ms. Joyce Young, it was pointed out that it was also important to publicize funding.

[196] Conversation with Mr. Glenn Sigurdson.

[197] A discussion of a recent Canadian application of regulatory negotiation in the Federal Environmental Assessment Review Office (FEARO) negotiations of regulations attached to the *Canadian Environmental Assessment Act* (CEAA) are included in Appendix D.

[198] Thus, for example, with respect to ADR in environmental matters, the Ontario Round Table report (Volume 1, 1991:11) observes that "[E]xperience to date reveals that, for the majority of environmental disputes, settlement is reached through mediation. In most cases, administrative tribunals or regulatory agencies play an integral role in the dispute, although the third party mediator is more often from the private sector than from the implicated government body."

dispute settlement, permitting and licensing, zoning and land use, and regulatory compliance and enforcement.[199] As the Canadian Round Table (1993:4) observes, "[O]pportunities for consensus processes exist at all stages of decision making . . . from the establishment of broad policies and regulations, to long range planning, to allocating land and resources, to resolving specific disputes, to monitoring and enforcement."

3.6.1 Policy Development

In many cases, agencies perform a legislative function through the making of rules (official policy) subordinate to statute; these rules include regulation and other statutory instruments, directives from the executive branch of government, and formal policy elaborated in policy-making proceedings.[200] In fact, it is not uncommon for agencies to use policy statements, guidelines and directives in lieu of legislation and regulations to control the behaviour of those being regulated.[201] It has been argued as well that while technically not having the force of law, policy statements have the force of law in the practical sense that they are what has to be done.[202] Thus, the issues of accountability, agency capture, quality of the basis of policy decisionmaking, and the public interest apply as equally to policy development as they do to rulemaking and may often benefit from the use of the reg neg process in contrast with conventional methods.[203]

The use of negotiation in policy development has the same advantages as in rulemaking, in that both processes occur at the front end of regulatory activities and can therefore forestall difficulties that may emerge "further down the line". Hoffman (1990:43) observes that in the United States, "policy dialogue" has been used successfully in a number of situations to reach agreement about policies affecting a number of stakeholders.[204] The British Columbia Round Table reports (volumes 1 and 2, 1991) review a number of situations in which negotiation has been used to establish policy in

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[199] Recently, the United States *Comprehensive Environmental Response, Compensation and Liability Act* (CERCLA) has been amended to permit negotiation of liability disputes. *See Barrister* 1993 (Winter).

[200] Canada, Law Reform Commission 1985:114.

[201] The reasons for this are often pragmatic. For example, in some areas it is not feasible for the agency to enforce regulations (owing to the lack of manpower, cost of litigations, etc.) but it is possible to negotiate compliance on a policy directive. (*See*, for example, the discussion by Smith (1993) on the regulation of life insurance and superannuation investments in Australia.) Alternatively, it is noted that occasionally policy directives and guidelines are used by the agency in order to by-pass the more formal requirements of rulemaking (e.g., notice and comment, hearings, review, etc.). In his analysis of the Ontario Securities Commission, Janisch (1989: 106) observes that in 1972 there were almost 100 pages of statute and just over 20 pages of policies. Without the number of statute pages increasing, the pages of policies grew to 170 in 1978, to 220 by 1985 and to over 300 in 1988. At the same time, the pages of regulations grew from 170 in 1978 to over 300 pages in 1988. Thus in 1988, subordinate legislative instruments covered some 600 pages, compared with the Act's less than 100. Janisch comments that there should be concern over the extent to which substantive law is contained in policies and not set out in the regulatory act or regulations, although he acknowledges that the Ontario Securities Commission, which develops its policies through extensive consultation with the industry it regulates, is a model for what ought to be done.

[202] Janisch 1989:106.

[203] *See*, for example, the discussion by Grunewald (1991) on the United States National Labor Relations Board's use of public participation in the setting of policy, which resulted in better and more data, clearer insights into the issues and a better policy.

[204] The National Coal Policy Project used policy dialogue to bring together representatives of the leading environmental groups and the coal industry, resulting in agreement on a large number of policy issues; and the Negotiated Investment Strategy used a negotiating procedure to reach agreement between various public and private agencies over the allocation of government funds. *See* also Administrative Conference of the United States *Sourcebook* 1990:317 for more examples of the use of policy dialogue in the United States: e.g., a Minnesota proceeding on the future of residential mental health facilities; the New Mexico Public Utility Commission's plan to moderate the effect of sudden shocks in electric utility rates; Narragansett Bay, Rhode Island's determination of the use of its bay; the Tennessee Governor's Safe Growth Team's development of a groundwater management strategy.

the environmental area. Hoffman comments that policy dialogue helps clarify and narrow issues, which can be of assistance in further actions such as the production of joint educational materials, action strategies, or the drafting of a new piece of legislation. But most importantly, as Janisch (1989) points out, policies have the effect of either permitting or prohibiting certain actions.[205]

A slightly different but related application of the negotiation process is provided for within the *Canadian Environmental Protection Act* (CEPA). Hudec and Paulus (1990) comment that in order to ensure a more effective federal-provincial coordination of environmental law enforcement, and presumably to reduce the risk of constitutional challenge, sections 34(6) and 98 of CEPA allow for the negotiation of federal-provincial agreements on the administration of the Act.[206] In addition, the reg neg process may be valuable when standards have not already been established in legislation or regulations in which case it is the responsibility of policy to set standards.

3.6.2 Standard-setting

Standards translate the intent of legislation and regulations into concrete requirements.[207] As such, standards are critical to the competitiveness of regulated enterprises. One approach to standard-setting is to allow regulated industry to set its own voluntary standards. It has been observed that often an agreement between cooperating firms may be reached easier and faster than through government procedures. A version of voluntary standard-setting is that involved in *consensus standards.* Like regulatory negotiation, consensus standards are established by panels composed of representatives of various interests and involve consensus decisionmaking.[208]

There are numerous examples of the use of the reg neg process in the setting of standards.[209] In some circumstances it has been claimed that consensus standards have been the predecessor to the regulatory negotiation process. For example, Breger, Chair of ACUS (1988:3), in his statement before the United States Subcommittee on Administrative Law and Governmental Relations, observed that voluntary consensus standards are typically drafted through a negotiation process that is followed by some kind of publication, with an opportunity for comment. Many consensus standards have been the basis of mandatory regulatory requirements.[210] Elsewhere, it has been observed that standard-setting would benefit from the use of the reg neg process because it would

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[205] Further discussion of the impact of policy guidelines is provided in Chapter 4.0, Section 4.2, Unintended Consequences of Regulatory Negotiation.

[206] *See* note 233.

[207] Two types of standards have been identified: performance standards and specification standards. Performance standards establish the levels of performance that those regulated must meet, but not the technology or means of compliance that must be used. It is claimed that where possible, performance standards appear to be the preferred approach because of their advantages, which include greater cost-effectiveness owing to the fact that the regulated party is free to choose the easiest and cheapest methods of compliance; greater possibility of innovation; improved market competition because they tend to avoid anti-competitive effects resulting from specified standards in that no enterprise has to possess a particular kind of technology; reduction in the need to amend regulations and to grant exemptions whenever new technologies emerge; they are more results-oriented; and they are more likely to lead to a greater willingness to comply. (Law Reform Commission of Canada, 1984)

[208] Canada, Department of Justice 1993.

[209] *See* Harter 1982:26; Administrative Conference of the United States *Sourcebook* 1990:317; and almost any American trade magazine.

[210] Harter 1982:35.

provide greater flexibility and incentives for industrial innovation.[211]

While there appears to be some debate in the United States about the value of uniform standards,[212] experience in Canada suggests that uniform standards reached via consensus decisionmaking can be very effective.[213] Unlike in the United States, it is claimed, where there is a strong adversarial approach between regulators and industrial standard-setters, Canadian regulating agencies have generally tended to be much more receptive to the negotiated standards developed by industry. The Canadian Standards Association tries to set standards before the developing process of a product that is, before great amounts of money have been spent on design and equipment. In this regard, it is pointed out that the Association is proactive and not merely a monitoring agency.

3.6.3 Dispute Settlement

It will be recalled that in Chapter 1.0 a distinction was made between negotiated settlements (which are responsive to disputes after they have emerged) and regulatory negotiations (which are prospective). In some situations, negotiated settlement may be used when there has been a court challenge to a regulation.[214] In others, it may be used to resolve disputes arising out of environmental disputes over the consequences of a particular action at a specific site. Harter (1982:41-42) points out that environmental negotiations, in particular, raise many of the same issues (but not all) that are raised by negotiation among interested parties developing a proposed regulation. For example, environmental negotiations are frequently polycentric (i.e., characterized by a large number of possible results and by the fact that many interests or groups will be affected by any solution adopted). These negotiations, therefore, must resolve clashes of competing values for which there are no explicit right or wrong answers. Other types of negotiations (such as the negotiation of complex standards, settlement of lawsuits challenging regulations, decrees in public-law actions, recommendations of various dialogue groups) all reveal the principles that guide the use of negotiation for developing regulations: balance of powers, limited number of parties, ripe issues, inevitability of regulation, mutually acceptable criteria, and expectation that a negotiated agreement will influence outcome.[215]

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[211] Latin 1985:1288-1289. However, according to Breyer's analysis of some American standard-setting processes, the type of negotiation involved does not appear to be what Fisher and Ury have termed "principled negotiation" or "negotiation on the merits"; rather, Breyer (1988:108) claims that "[T]he standard arguments and power of the parties, not the merits of the case, led to a final standard . . . The negotiation involved in standard-setting does *not* turn that process into a form of collective bargaining. The parties do not all meet and trade specifics in order to find general agreement. Rather, the negotiation consists of efforts by the parties to use their weapons to shape the final standard other than through rational analysis . . . To this extent, the ideal of the rational standard is sacrificed to the criteria of the negotiator sometimes to the point where the net result is an agreed-upon but ineffective standard."

[212] Latin 1985.

[213] In fact, the Canadian Standards Association sells its standards to American as well as other countries' manufacturers. This has given Canadian manufacturers an edge in the international market but, it is claimed, this advantage is one that has not been properly exploited because the Standards Council of Canada is under the jurisdiction of Consumer and Corporate Affairs. Conversation with Mr. Peter Rideout, Canadian Standards Association, April 15, 1993.

[214] Harter (1982:36), for example, observes that in the United States the negotiated settlement of litigation challenging rules has generated little attention despite the fact that it is a relatively common occurrence. He notes that the setting of the challenge helps explain why the parties negotiate before litigation rather than earlier in the rulemaking process. First, the parties are well defined; second, the issues are defined and ripe for decisions; third, the agency recognizes that it does not control the ultimate decisions because the final decision rests with the court; and finally, there is a deadline for reaching an agreement.

[215] It has been observed, however, that there is a tendency for lawyers to confuse settlement negotiations with other types of "softer" ADR

3.6.4 Permitting and Licensing

Negotiation has been used in two aspects of licensing and permitting: negotiation over the revocation of a licence and negotiation over the issuance of a licence. With respect to the former, it has been observed that licensing is a much more effective and complete method of controlling regulated enterprises than private enforcement methods. Since carrying on a business without a licence generally involves serious sanctions, the economic cost of operating a business in violation of regulations and thereby risking the loss of a licence represents a considerable deterrent to regulatory infractions. Licensing or permitting regimes in the areas of transportation, importation of goods, broadcasting and fisheries are characterized more by negotiations between the regulator and those regulated than by sanctioning; however, the threat of loss of licence or permit can be used with great effect, it is claimed, to drive these negotiations towards the achievement of statutory and regulatory requirements.[216]

The British Columbia Round Table report (Volume 2, 1991:14) notes that the issuance of a permit or licence is often a complex matter involving increasing competition for scarce resources, conflicting values, and uncertainties regarding the state of the resource or the possible effects of a proposed use. As well, it is becoming increasingly apparent that the public wants to be involved in making these kinds of decisions when their interests are directly affected. Consequently, it has been claimed that a collaborative approach involving negotiation may be particularly helpful for reasons similar to the benefits recognized in regulatory negotiation:

- There are better prospects for "keeping the peace" in the long term if the parties can sort out their differences at the local level in a collaborative fashion, rather than have a decision imposed by a central, adjudicating authority.

- A collaborative approach can help to minimize the time and resources spent on dealing with conflicts over resource allocations. The added costs of consensus-building at the front end of decisionmaking can be offset by cost reductions resulting from fewer appeals and improved voluntary compliance with permits and licences.

- Collaborative approaches can be an effective way of improving the quality of government service to the community by involving the public and stakeholders in local land- and resource-use decisions, providing proof that their concerns are being addressed.

- Collaborative approaches can help to effect appropriate decentralization of decisionmaking, removing unnecessary central intervention and making regional managers more accountable for decisions.[217]

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remedies, including regulatory negotiation. The skills required are often very different. (*See*, for example, David 1991:53)

[216] That is, the BATNA in these cases is less desirable than negotiation. *See* Macpherson 1989:17-18.

[217] British Columbia Round Table, Volume 2, 1991:18. The British Columbia report goes on to describe conditions required for successful

3.6.5 Zoning and Land Use

One of the most notable examples of the consensus-building process is currently being used by the British Columbia Commission on Resources and the Environment (CORE). CORE was created through legislation, the *Commissioner on Resources and Environment Act*, in July 1992, and is mandated to develop a resource and land-use strategy. The principal method of developing the strategy is through provincial, regional and community consensus decisionmaking processes that reflect the basic characteristics that have been attributed to the reg neg process.[218]

Negotiations have also been used in the settlement of land claims agreements with the First Nations. While most of these agreements have now been settled, there is opportunity for further negotiations as some of the more recent agreements have implementation agreements attached to them.

3.6.6 Compliance and Enforcement

In relation to environmental regulations, the Ontario Round Table report (1992:13) notes that the use of ADR to enforce compliance has been under-utilized, mainly because there has been a historical bias in favour of judicial enforcement. Ironically, however, most of these cases are settled out of court. The report suggests that because the authority to settle judicial enforcement cases currently exists, an expanded mandate to negotiate these actions should be possible.

The appeal of this approach to potential (less serious) defendants, states the Ontario report, should be strong since there would be cost savings and the opportunity to work out an enforcement schedule that the violator could meet, rather than risk being the subject of an injunction to correct the violation. On the other hand, it is recognized that there could be some resistance as well. For example, the speed with which a case can be resolved will likely require the defendant to spend large sums of money for clean-up or abatement long before it would be required to do so were the case to languish in court. In addition, without private training or incentives, those making the decision either to litigate or negotiate may be inadequately informed as to the direct benefits of alternative dispute resolution. It is noted too that it is very important that the private defendant recognize that agreement with the government to negotiate does not preclude the possibility of future prosecution should the negotiation fail.[219]

In Australia, negotiated compliance strategies have been used, for example, in the regulation of insurance and superannuation investments. In his review of this approach, Smith (1993) observes that it appears to work best when the regulated population is small, because it requires that the regulator have sufficient resources to identify patterns of noncompliance and develop by negotiation a program to overcome it. One question that has arisen in relation to these negotiations is: Who should be parties at the table; that

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negotiations.

[218] *See* also Ontario Round Table 1992:11-12.

[219] The Ontario Round Table report (1992:14) refers to the misunderstanding that occurred with Abitibi Price.

is, should the public be allowed to participate?[220]

3.6.7 Summary

The demand for and benefits of negotiation in a variety of regulatory applications is being given more attention. The move towards greater use of negotiation reflects, in part, the same underlying conditions that have prompted regulatory negotiation: inclusion of the public in regulatory decisionmaking and increasing complexity in regulatory matters. While there appears to be a certain momentum in the use of the reg neg process, practitioners suggest there is a need for care, as is the case with negotiated rulemaking, in the selection of situations in which negotiation is used. Further, the criteria and principles that have been developed to guide regulatory negotiation are just as important in other uses of the reg neg process,[221] although it appears that observation of these guidelines has not always occurred.

3.7 Legislative Basis for Regulatory Negotiation

Although regulatory negotiation has been used successfully without any *specific* legislative foundation, some have claimed that the process would profit from statutory support.[222] As most readers will know, the United States has recently passed such legislation, the *Negotiated Rulemaking Act* (1990).[223] In Canada, which has not had the benefit of an agency such as the Administrative Conference of the United States to promote and guide the reg neg process, there may be an even greater need for supporting legislation although, as noted below, opinion is divided on this matter.

3.7.1 Arguments in Favour of Legislation

3.7.1.1 Provide Legitimacy to the Process

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[220] In another Australian example involving regulation of an asbestos mine in Baryulgil, New South Wales, there appears to be some confusion between what has been called the "advise and persuade" approach to compliance, and a reg neg approach. In this case, Gunningham (1987) concluded that the government failed to fulfil its regulatory responsibilities by adopting a too-lenient course of action. In contrast, the reg neg approach need not result in any degree of leniency; in fact, there have been occasions when the decisions reached via negotiations have been more stringent than those the agency would have made. (Conversation with Mr. David Evans, *supra*.)

[221] For example, with respect to the requirement that consensual agreements should be binding, the Ontario Round Table (1992a:26) has recommended that "[T]o improve the enforcement record of consensual agreements, where the role of the government in the dispute is that of a permitting or licensing body, the Ontario government should make each party's compliance with the agreement a necessary condition to the exercise of that regulatory discretion." Furthermore, the Ontario Round Table recommends that ". . . written, consensual agreements contain a schedule for compliance. This may help alleviate future disagreement between the parties regarding compliance which in turn may prevent appeal or abandonment of the agreement."

[222] For example, the ACUS recommendation 82-4 (Appendix B), recommended that: "Congress should facilitate the reg neg process by passing legislation explicitly authorizing agencies to conduct rulemaking proceedings in the manner described in this recommendation. This authority, to the extent that it enlarges existing agency rulemaking authority, should be viewed as an experiment in improving rulemaking procedures. Accordingly, the legislation should contain a sunset provision. The legislation should provide substantial flexibility for agencies to adapt negotiation techniques to the circumstances of individual proceedings, as contemplated in this recommendation, free of the restrictions of the *Federal Advisory Committee Act* and any *ex parte* limitations. Legislation should provide that information tendered to such groups, should not be considered an agency record under the *Freedom of Information Act.*"

[223] This Act is reproduced in Appendix C and is reviewed later in this section.

One of the reasons for the American *Negotiated Rulemaking Act* was that there was some confusion about the legitimacy of the reg neg process owing to varying interpretations of the provisions of the American *Federal Advisory Committee Act* (FACA).[224] Specifically, there was some question about the ability of subgroups of a regulatory negotiating committee to meet privately.[225] The *Negotiated Rulemaking Act* clarified the legitimacy of subgroups departing from the need to make records and proceedings available as stipulated by FACA.[226]

Providing legitimacy in relation to other statutes (such as the American FACA mentioned above or, in Canada, other statutes) , as well as in relation to the development of regulations in general, constitutes one of the chief arguments in favour of legislation. This argument for legislatively legitimizing the process is seen as particularly relevant with respect to government regulatory managers who may be doubtful or otherwise resistant to the idea of regulatory negotiation and who, it is feared, will ignore this option. While proponents of reg neg legislation stress that the use of regulatory negotiation must remain discretionary, it is nevertheless argued that the mere existence of legitimizing legislation would help counteract departmental resistance to the process.[227] In this sense, it is claimed that a reg neg statute would fulfil a hortatory function and provide formal endorsement of the process.[228]

3.7.1.2 Ensure Compatibility with Other Legislation

Another argument relates to the procedures that ought to govern rulemaking by negotiation. Depending on the nature of the legislation, it could fill in procedural gaps that may exist in Canadian administrative law in contrast with American administrative law, which has had the guidance of the *Administrative Procedure Act* (APA) provisions regarding rulemaking and the FACA provisions regarding advisory committee procedures.[229] However, this concern with procedures cuts both ways in the sense that, in the United States for example, APA itself has been found wanting with respect to the development of regulations, and thus the *Negotiated Rulemaking Act* is seen as an alternative to the limitations posed by APA.[230]

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[224] The requirements of FACA include the following: that new advisory committees be established only after public notice and upon a determination that establishment is in the public interest (9), that the membership of each advisory committee be fairly balanced in terms of the points of view represented (5), and that meetings of advisory committees be open to the public, subject to the same exemptions as in the United States *Government in the Sunshine Act* (5 U.S.C. 552b). For a review of some of the limitations imposed by FACA in relation to negotiated rulemaking, *see* Harter 1982:33, note 180.

[225] *See* British Columbia Round Table report (Volume 2, 1991:10). It is observed that such meeting of subgroups may be very useful to develop alternatives for consideration by the larger committee or, in the case of allied interests, to determine a negotiating position (Marshall J. Breger, Chair, ACUS, 1988 in Administrative Conference of the United States 1990:374).

[226] In the preamble to the United States *Negotiated Rulemaking Act*, the section on Congressional Findings notes, at point (6) that: "Agencies have the authority to establish negotiated rulemaking committees under the laws establishing such agencies and their activities and under the *Federal Advisory Committee Act* (5 U.S.C. App.) . . . The process has not been widely used by [other] agencies, however, in part because such agencies are unfamiliar with the process or uncertain as to the authority for such rulemaking." (Administrative Conference of the United States *Sourcebook* 1992:800).

[227] *See*, for example, Hoffman 1990:81-86 and Breger 1989:2.

[228] Conversations with Mr. Chris Kirtz, United States Environmental Protection Agency, April 6, 1993, Ms. Wendy Frances, April 7, 1993, and Mr. Glenn Sigurdson, April 7, 1993.

[229] *See* the review of the public interest argument by Funk, *supra*, note **Error! Bookmark not defined.**.

[230] Harter 1982:10-11.

In Canada, further discussion and analysis would be required to determine the compatibility of present administrative law with any procedures deemed appropriate to regulatory negotiation.[231] For example, consideration needs to be given to the ability of a negotiated regulation to withstand a subsequent challenge, and whether amendments to present administrative procedures are required to protect negotiated regulations. If some uncertainties arose in this regard, legislation specifically designed for regulatory negotiation could be used to clarify the points in question and reconcile regulatory negotiation with procedural requirements.

In addition, it would be necessary to review current legislative mandates of regulatory agencies to determine whether questions arise with respect to the delegation of quasi-legislative authority, and whether a negotiated regulation is consistent with an agency's statutory authority.[232] Perritt (1987:901) observes that, while in the American legal context it is appropriate to think about delegation issues associated with negotiated rulemaking, it is important not to exaggerate the magnitude of the problem. He goes on to explain that negotiated rulemaking does not violate the American delegation doctrine for a number of reasons: negotiators play only an advisory role and do not usurp the final decisionmaking authority of the agency; participation in the negotiations (if pursued under the ACUS recommendations reviewed above) ensures adequate representation of affected groups, which is probably greater than when the agency makes rules unilaterally; and since under APA the negotiated rule is subject to judicial review, if it can pass scrutiny by the courts it thereby necessarily passes the delegation doctrine. The situation in Canada, however, may be different from that in the United States.[233] If there is some question about this issue, a clarification of the regulatory negotiation process in legislation designed specifically to address these issues may forestall unnecessary legal debate on the matter and would serve as a reference point for any future legislation in which either federal or provincial legislatures might want to make provisions for the use of regulatory negotiation.[234]

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[231] In August 1989, the Office of Privatization and Regulatory Affairs hosted a seminar on negotiation and the regulatory process for senior public servants responsible for regulatory enforcement. The seminar introduced participants to negotiation theory, to an overview of the United States *Negotiated Rulemaking Act*, and to a variety of private- and public-sector perspectives on the role of negotiation in the regulatory sector (Hoffman 1990:77).

[232] The 1991 British Columbia Round Table, Volume 2, report, for example, notes that further consideration needs to be given to statutory constraints to the use of regulatory negotiation and the legislative measures that would provide the basis and incentives for the use of the reg neg process. It has been observed that some legislation may not be amenable to the reg neg process; for example, the previous federal environmental legislation, the *Environmental Control Act*, has been criticized because it failed to make provision for public input into the regulation of environmental contaminants (Northey 1991).

[233] In his review of federal environmental protection, Northey (1991) observes that the federal government has constitutional limitations relating to federal-provincial jurisdiction that affect its ability to regulate protection of the environment. He comments that: "In Canada, constitutional law inhibits environmental laws because the jurisdictional picture dividing federal and provincial powers divides the environment into many different spheres." This division, he states, accords nicely with the point source approach to environmental regulation, but it conflicts with the more sophisticated ecosystem approach. This conflict has two resolutions. At this point, the constitution has won over the environment. The federal government has changed the original cradle-to-grave proposal to lessen its effect on the provinces. This move directly affects one piece of legislation, but it also affects most future environmental action at the federal level. Among other things, Canadian environmental regulation lacks complete public accountability to ensure that governments and businesses strike sustainable bargains. Northey describes two possible solutions. One approach involves a shift from multi-faceted jurisdictional federalism to a geographical federalism. With geographical federalism, the provinces would deal with local environmental problems and the federal government would deal with national environmental problems (under the general federal power of POGG (peace, order and good government). The second approach to mitigating the constitutional restrictions hindering the federal government involves enhancing administrative arrangements with the provinces, including the creation of joint federal-provincial environmental boards which could, among other things, enhance environmental uniformity across the country by taking many environmental issues out of the hands of politicians and political bureaucracies.

[234] Breger *op. cit.*:3.

One further issue that arises with respect to the compatibility question concerns the validity of regulatory negotiation vis-à-vis the *Canadian Charter of Rights and Freedoms.* Jackman (1991) observed that in Canada, decisionmaking such as that involved in regulations has been delegated to government departments, administrative agencies and other quasi-government bodies, with the result that it is no longer sufficient to rely on a parliamentary model of democracy as a means of ensuring citizens' participation or of control. Given this situation, she claims, negotiation makes sense and is, in fact, necessary if one believes in a participatory democracy.

Moreover, according to Jackman's analysis, the concept of fundamental justice contained in the Oakes interpretation of section 7 of the Charter must be read to ensure that regulatory decisions are informed by meaningful public participation in the decisionmaking process. As well, participation is valuable because it enhances the accuracy of decisionmaking. It does so by ensuring that the decision-maker is fully aware of the context of the decision, and that all relevant facts are brought to his or her attention. It also enhances accuracy by promoting accountability: decision-makers who know they are publicly accountable for their decisions are likely to make them with a greater degree of care. Lastly, participation via negotiation contributes to a sense of justice at both a subjective and an objective level.

3.7.1.3 Provide Procedural Guidance - United States *Negotiated Rulemaking Act*

Although, as mentioned previously, proponents of regulatory negotiation note that the process is a discretionary one, it has nevertheless been observed that legislation may provide some guidance regarding the appropriate criteria and procedures to be used in these types of negotiations. As well, by formulating these procedures in statutory form describing the dynamics of the reg neg process, the utility of regulatory negotiation may be elevated in the minds of potential users.

The United States *Negotiated Rulemaking Act* fulfils this function. This Act establishes a statutory framework for agency use of regulatory negotiation to formulate proposed regulations. The Act supplements the rulemaking provisions in the American *Administrative Procedure Act* and clarifies the authority of federal agencies to conduct regulatory negotiations. The provisions of the Act codify the practices involved in regulatory negotiation while permitting regulatory agencies discretion about using the regulatory negotiation process to draft regulations.

The *Negotiated Rulemaking Act* has been described as permissive, with the observation that the drafters intended that the Act not impair any rights otherwise retained by agencies or parties. Section 581 expressly provides that the Act is not intended to limit innovation or experimentation with the regulatory negotiation process. While the Act permits an agency to publish as its own the consensus proposal adopted by the negotiating parties, nothing in the Act requires the agency to publish either a proposed or final regulation merely because a negotiating committee proposed it. On the other hand, section 583(a)(7) suggests that the agency, to the maximum extent possible consistent with the legal obligations of the agency, will use the consensus of the negotiating

committee with respect to the proposed regulation as the basis for the rule proposed by the agency for notice and comment.

Section 583 also lists several criteria to be considered by agencies in determining whether to use negotiated rulemaking in any particular instance. Among the criteria are those recommended by the Administrative Conference of the United States in its recommendations 82-4 and 85-5 (reviewed above). Section 584 requires public notice of the proposed regulation and stipulates that those parties believing that they are not adequately represented on the negotiating committee must be given an opportunity to apply for membership, although the agency retains discretion as to whether to grant such requests.

Section 585 makes clear that agencies establishing negotiating committees under the Act are also to comply with APA. At least one member of the committee must be a representative of the regulatory agency. Section 586 addresses procedures of the negotiating committee and provides for selection of a neutral facilitator or mediator to assist in its deliberations. Section 587 permits an agency to keep a negotiating committee in existence until promulgation of the final rule, but also allows earlier termination if the agency or the committee so chooses. Options for agencies with respect to acquiring the services of convenors or facilitators are addressed in section 588. This section also authorizes agencies to pay expenses of certain committee members in accordance with the United States *Federal Advisory Committee Act*.

Section 589 is of particular significance in the Canadian context as it outlines the role of the Administrative Conference of the United States with respect to the regulatory negotiation process. Because Canada does not have an agency equivalent to ACUS, this section raises questions about the necessity for and desirability of creating such an agency. Essentially, the services provided by ACUS in relation to regulatory negotiation include consultative and clearinghouse functions; the provision of a roster of potential convenors and facilitators; the development of procedures to obtain convenors and facilitators; compilation of data on negotiated rulemaking and the review and analysis of reports and information received from negotiating committees for submission to the federal government; the evaluation of regulatory negotiations and recommendation of improvements to the process; the provision of training in reg neg techniques and procedures for personnel of the federal government or to private parties; and the provision of certain funds.

Finally, to avoid creating new sources of potential litigation, section 590 provides that agency actions pertaining to *procedural* decisions in negotiated rulemaking are not subject to judicial review; however, otherwise available judicial review of the *rules* promulgated through the negotiation process is not affected by the Act.[235]

As can be seen, the United States *Negotiated Rulemaking Act* is intended to provide flexible guidelines for the use of regulatory negotiation. One of the key provisions in the Act authorizes funds to assist agencies in implementing the process, to provide training, and to pay certain expenses of negotiating committees. It also, as

[235] Administrative Conference of the United States, Federal Administrative Procedure *Sourcebook* 1992:792-793.

suggested in previous sections, offers clarification about the regulatory negotiation process with respect to procedures that have been stipulated in other legislation.

Those who favour this legislation emphasize that it provides a framework only: "Negotiated rulemaking works best when it retains a flexible character that can be adapted to the exigencies of each rulemaking situation. To bind the process too tightly, with too many procedural rules, would be to destroy its best feature."[236] But at the same time it is pointed out that agencies that have not tried regulatory negotiation want and need guidance on how to proceed. Because there are questions regarding the reg neg process in relation to other statutory procedural requirements, the creation of a reg neg act could and should, it is claimed, resolve these questions in a uniform manner for all applications.

3.7.2 Arguments Against Legislation

Essentially, there are three arguments against the creation of specific reg neg legislation. Firstly, it is feared that such legislation might "bind the process too tightly" (to use Levin's words, *supra*). Rather than facilitating the process "which is acknowledged to be valuable in some situations even by those who are not in favour of legislation" it may simply result in another layer of administrative procedures that serve only to impede regulatory decisionmaking.

The second argument is based on the view that because successful regulatory negotiation depends on the continuous consent of the parties, legislation such as the United States *Negotiated Rulemaking Act* disturbs the fragile, consensual balance that is necessary to make the process "work". Because the Act gives the agency the sole authority to make major process decisions (e.g., whether to hold a negotiation, who to invite, when to continue or call off negotiations), it may unintentionally disturb the consensual atmosphere. While it is recognized that consultation with convenors, facilitators and stakeholders is required, in the end it is the agency that makes these decisions; furthermore, in the American context, these decisions are not subject to judicial review (section 590, *supra*).

The third, and somewhat related argument, is that it would be premature to attempt legislation at this time. For example, problems such as that presented above should be resolved before being codified in legislation. Objections to legislation are also often presented in conjunction with the perceived drawbacks of regulatory negotiation.[237] It is argued, therefore, that until there has been more experience with regulatory negotiation, it would be inadvisable to create a negotiated rulemaking statute, especially since the process has been used successfully without legislative support.

3.7.3 Alternatives to Reg Neg Legislation

[236] Levin 1988:4. This view was reflected in comments made by Canadian spokespersons interviewed for this report.

[237] *See*, for example, Doniger 1988, and the section on drawbacks in Chapter 1.0.

3.7.3.1 Canadian Suggestions

Before considering alternative suggestions, it should be noted that some Canadian organizations have favoured the legislative approach. For example, the Ontario Round Table report (1992a:25), in relation to its policy of sustainable development, has recommended that: "[T]he Ontario government should direct each concerned ministry, agency or board to develop and adopt a policy addressing the use of alternative means of dispute resolution and case management. In developing such a policy, each agency, board or ministry should consider alternative means for resolution of conflicts regarding: rulemaking; . . . other administrative actions." In addition, the report (1992:27) proposes that: "[T]o minimize the regulatory enforcement role of the government, Ontario should consider a negotiated rulemaking program similar to that practised by the federal government of the United States. Under negotiated regulation, implicated private parties negotiate the terms of a regulation with the government with the understanding that parties to the agreement are bound not to litigate or lobby against the terms that implement that agreement."

Two alternative proposals have been suggested. The first suggests that rather than creating a separate statute, individual statutes governing regulatory authority could include either provisions for regulatory negotiation or acknowledgment of the process in their preambles.[238] This would permit the regulatory negotiation procedures to be tailored to the specific responsibilities and activities of each agency, but sacrifices uniformity with respect to procedural questions. A second suggestion is to use policy guidelines rather than legislation to support and guide regulatory negotiation. This approach could legitimize the process, but would permit, perhaps, too much hesitancy, resistance or uncertainty.

According to Canadian spokespersons interviewed for this study, the idea of guidelines met with less support than the legislative approach; however, most of those interviewed were very cautious about both devices. Two major drawbacks of using guidelines were noted. First, they may jeopardize the flexibility required for the process: "Each application is unique and must be left to develop its own procedures." Secondly, there is great value in permitting each negotiating committee the opportunity to create its own guidelines: this not only offers them an opportunity to create the procedures and ground rules best suited to their purpose, but also provides an excellent opportunity for participants to familiarize themselves with the negotiation process.[239] On the other hand, it has been acknowledged that some sort of descriptive information about regulatory negotiation, highlighting the general features of the process, would help acquaint potential participants with the process.

3.7.3.2 The Victorian *Subordinate Legislation Act*

Other jurisdictions have addressed some of the advantages represented by

[238] Conversation with Mr. Glenn Sigurdson. At the present time in Canada, there are only a few statutes that acknowledge the legitimacy of negotiation: e.g., the Yukon *Land Claims Agreement Act* and the British Columbia *Commission on Resources and the Environment Act* and CEPA (although CEPA has been criticized for recognizing the use of mediation in only one context).

[239] Conversations with Mr. Glenn Sigurdson, April 7, 1993 and Judge Barry Stewart. *See* also Chapter 2.0.

negotiated rulemaking by adopting a slightly different approach. One of the most critical issues underlying the use of regulatory negotiation concerns the need (and as some have argued, the right) of the public to participate in the creation of subordinate legislation. Craven (1990), observing that the temptation for Canada is to look to the United States "with its long-established and well-documented procedure" as an exclusive source of inspiration, suggests that Australia's approach may offer an alternative model to the American APA and *Negotiated Rulemaking Act*. Rather than legislatively authorizing regulatory negotiation, the Victorian statute, the *Subordinate Legislation Act* (1986), provides for a regime of mandatory consultation for a broad range of regulations.

While acknowledging that the Canadian federal government has implemented a detailed policy of consultation in connection with the making of regulations, Craven claims that the policy is open to criticism on the ground that, being purely policy, it does not constitute a legal requirement, and on the basis that there is no independent mechanism of enforcement or scrutiny to ensure that the policy is actually being followed.[240] In contrast, the Victorian scheme (operating at the state rather than the federal level) constitutes a statutory requirement of consultation whenever a proposed regulation is likely to impose any "appreciable burden, cost or disadvantage", whether direct or indirect, tangible or intangible, on any sector of industry, commerce, consumers, members of the public or the state.[241]

The real significance of the Victorian Act, however, resides in the regulatory impact statement process, which includes requirements that are much more specific (and therefore practically more onerous) than the comparatively vague requirement for consultation. Under Schedule 3 of the Act, an impact statement must be composed of four parts: a statement of the objectives of the proposed regulation; an identification of the different means by which these objectives may be achieved; an assessment of the financial and social costs and benefits of each alternative; and a summary of any alternatives to the making of the regulation, together with reasons why such alternatives have not been considered appropriate.[242]

A copy of the regulatory impact statement must be sent to the Department of Management and Budget, whose director-general is required to consider the extent to which a statement adequately assesses the impact of the proposed regulation, and to the Legal and Constitutional Committee of the Victorian Parliament. In addition, a summary of the information contained in the impact statement, information about where the statement may be obtained, and a period of time for submissions, are published along with the notice of a new regulation. All comments received must be considered by the minister responsible for the regulation before the regulation is made.

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[240] At the provincial level, only Quebec has instituted legislation, the *Regulations Act* (1986), providing for consultation although it is subject to a broad exempting formula. Ontario has considered this kind of legislation but has not put it in place.

[241] Some proposed regulations are exempt: e.g., those that relate to matters that are of a fundamentally declaratory or machinery nature; those that deal with relations, organization or procedures within or between departments or statutory bodies; and those that impose no appreciable burden, cost or disadvantage upon any sector of the public (Schedule 2 guideline 3(f)); those that increase fees and charges only to the extent necessary to take account of inflation (guideline 3A); and those dealing with rules of court (guideline 3B). In his review of this piece of legislation, Craven observes that some of the wording in these exemptions could be more precise.

[242] The standards required in the Australian impact statements are more demanding than is typically the case for Canadian regulatory impact analysis statements (RIAS) (Craven 1990:238-9).

The Victorian legislation departs from practices required by "purely policy" (*supra*) guidelines with respect to its enforcement provisions, which are overseen by the Legal and Constitutional Committee mentioned above.[243] The Committee is authorized in Section 14(2) to submit a report to Parliament either in support of the proposed regulation, or to disallow it in whole or in part, or recommend that it be amended. The report may be passed by *both* houses of Parliament. The Committee's report is based on the following considerations: whether there has been a failure to undertake adequate consultation; a failure to prepare an impact statement where required; the preparation of a deficient statement; or a failure to comply with the notice, publicity and comment procedures.[244] Any of these deficiencies or omissions are grounds for rendering a rule subject to report by the Committee, and to disallowance or amendment by Parliament. In effect, enforcement is parliamentary.

In his review of the Victorian legislation, Craven (1990:249) observes that one of the weaknesses of the scheme is that it is comparatively difficult for the Legal and Constitutional Committee to detect a breach of the general consultative requirements;[245] as a result, the Committee tends to focus upon the more concrete requirements of the impact statement process. The result has been that compliance with the impact statement requirement has increased, from about 8 per cent in 1985 to approximately 80 per cent in 1988. Craven suggests that this increase in the use of impact statements is largely the result of the Committee's rigorous oversight and the fact that the majority of the Committee's recommendations in this regard are accepted by Parliament. A further consequence of the increased use of impact statements has been an increased public response rate. Moreover, the number of occasions in which public comment has caused alterations to proposed regulations has also increased. Although the figure is not high about 10 per cent it does reveal, Craven suggests, that a not insignificant proportion of proposed regulations are in fact changed in response to public submissions.[246]

Comparing Canada and Australia, Craven (1990:257) observes that:

> Perhaps the most salient feature of the Victorian scheme when compared to Canada is that is externally enforced. By this it is meant that adherence of executive rule-makers to the relevant consultative requirements, including those comprised in the impact statement process, is actively policed by a body outside and independent of the executive itself, namely, the Legal and

[243] This Committee is a joint investigatory committee of the Victorian Parliament composed of members of all parties and drawn from both houses of Parliament. By custom, membership is evenly divided between Government and Opposition. Craven observes that one question that might arise in relation to this arrangement is the degree to which committee decisions are influenced by party politics. He claims that although it would be naive to suggest that party politics never influence the judgment of committee members, there is encouraging evidence that overall the Committee approaches its task in a broadly apolitical fashion. Thus, there are few expressions of dissent in the Committee's reports to Parliament (Craven 1990:255).

[244] The Committee, it is reported, is serviced by a highly efficient legal and administrative staff (Craven 1990:256).

[245] According to Craven (*Ibid*.:256), enforcement of a breach of the consultative requirement is not clear in the sense that there is some confusion as to whether such a breach is subject to judicial as well as parliamentary review.

[246] Some regulations are exempt from the impact statement requirement if the Premier orders that it is not in the "public interest" that a rule comply with this requirement (e.g., as in cases of special urgency). In 1988, about one in six rules were exempted a figure, Craven claims, that is higher than might be expected. In its *Tenth Report* (1987), the Legal and Constitutional Committee addressed this issue, stating that it appears that this exemption was being used to avoid complications that might arise in connection with politically sensitive or complex rules. Part of the problem in this regard is that the Premier is not required to give any explanation of the decision to exempt a rule.

> Constitutional Committee. This is in stark contrast to the Canadian position, where full compliance with consultative requirements will ultimately be a matter of executive decision. Moreover, it follows from the preceding analysis of the activities of the Victorian Committee that enforcement under that regime is not merely some theoretical possibility, but a continuing reality.
>
> The value of the Australian approach is based on three observations:
>
> - Without some enforcement mechanism, it undoubtedly will be extremely difficult to determine the extent to which any consultative system meets with compliance.
> - Specifically in the Canadian context, the limited figures available concerning the inclusion of regulatory initiatives in the Federal Regulatory Plan are not particularly encouraging.[247]
> - Even the most cursory perusal of the regulatory impact analysis summaries collected in the *Canada Gazette* will reveal that many such documents are, as a generalization, suspect as descriptions and analyses of the rules to which they relate. Objectives are frequently unduly narrow or vague; alternatives are either not identified or peremptorily dismissed; cost-benefit analysis is often superficial; and there is an abundance of jargon and pat phrases.
>
> (Craven 1990:258-9)

In short, Craven claims, it seems likely that if one is serious about a requirement of consultation, one will be prepared to have that requirement enforced, rather than left essentially to the good will of those upon whom it operates. He points out that if it is claimed that "authorities always consult anyway", there would be little harm in converting that practice from one that is unenforced to one that is enforced.

3.7.4 Summary

The Victorian scheme has much in common with the conventional Canadian approach insofar as it is based on a consultative process rather than one of negotiation. The Victorian program, however, sharpens the consultative requirements by making them legislatively mandatory and by providing external enforcement. It is possible, of course, that this approach could be subject to the same criticisms presented above with respect to arguments against reg neg legislation (e.g., "strait-jacketing" the process); however, as noted above, lack of legislation is also open to criticism. While the Australian model has the appeal of working within an already familiar consultative approach to rulemaking, it lacks some of the advantages of regulatory negotiation such as the direct interaction of stakeholders and the mutual problem-solving orientation of the reg neg decisionmaking

[247] In 1987, for example, only 30 percent of regulations were actually pre-published (Office of Privatization and Regulatory Affairs (1988), "Regulatory Reform: Making it Work", p. 12. During 1987, 42 percent of new regulations were apparently the subject of early notice in the 1987 Federal Regulatory Plan (*Ibid*.:11).

process.[248]

Clearly, the issues raised by the American and Australian models warrant more analysis and discussion. Perhaps one of the most important points to keep in mind when considering the pros and cons of legislation, is the fact that Canada is different from the United States. The constraints and stipulations imposed by both the American APA and FACA are not present in Canada and therefore may not need to be addressed to the same degree, particularly in legislation. Nevertheless, despite the fact that much of the debate concerning reg neg legislation has been shaped by American experience and views, many of the issues raised may be seen to have salience in relation to the Canadian situation.

Arguments in favour of legislation include the views that enabling legislation would provide both legitimacy to the process and formal encouragement for its use, and clarify procedural law questions, formalize agencies' authority for using regulatory negotiation, and provide guidance about how to proceed. Arguments against reg neg legislation claim it could reduce flexibility, upset the consensual balance required for regulatory negotiations, and prematurely codify the process.

[248] Craven (*Ibid*.) also discusses some of the shortcomings of the Victorian statute. For example, owing to the number of exemptions, only about one in four rules will be subject to the provisions of the Act. In addition, the Act does not apply to less formal forms of "rules" such as directives, guidelines, decrees, etc. Lastly, the wording of the Act is often vague, as in the case of "appreciable burden, cost or disadvantage upon any sector of the public". Basically, Craven claims that the Act suffers from the major deficiency that it is cast too narrowly, and is thus subject to fairly ready evasion.

4.0 CONCLUSIONS AND SUGGESTIONS

4.1 The Appropriateness of Regulatory Negotiation

In this discussion of the appropriateness of regulatory negotiation, two perspectives are adopted. Firstly, the appropriateness of regulatory negotiation is considered generally, in terms of the larger political context in which rulemaking occurs. Secondly, the appropriateness of regulatory negotiation is considered in its individual applications and thus involves questions about particular situations in which the reg neg process may or may not be advisable.

4.1.1 Appropriateness of Reg Neg in General

Regulatory negotiation is an alternative as well as supplementary approach to rulemaking that is considered to be responsive to the demands of present-day political and technological realities. It is responsive to the scientific and social complexity of the issues involved, and to the demand for public participation in the decisionmaking process.[249] It is able to be responsive because it involves consensus decisionmaking among all affected parties, including the regulatory agency or ministry.

Craven (1990:233-234) has observed that in jurisdictions such as Australia and Canada, regulatory reform is informed by a number of agendas:

- A consultative agenda (entailing some degree of public participation in the decisionmaking process).
- An analytic agenda (entailing assessments of whether the policy initiatives embodied in regulations are properly thought out).
- An accountability agenda (involving concerns that bureaucrats are not sufficiently required to publicly articulate the policy reasoning and assumptions "black box rulemaking").
- Deregulatory and "sunsetting" agendas (involving beliefs that there are "too many regulations" generally, and that regulations remain on the books long after they have outlived their usefulness, respectively).
- An accessibility agenda (entailing fears that regulations are not widely enough published and once published, are not kept available).
- A parliamentary or constitutional agenda (involving an abiding suspicion that Parliament, as the ultimate authority of political legitimacy, has lost control of agency rulemaking).

Craven suggests that in any regulatory decision making scheme, it may be expected that each (or at least a number) of these agendas will be operating and will

[249] Within the last couple of decades the political reality once described as "Parliament legislates, the Executive administers" has evolved so that, today, legislative functions such as the promulgation of regulations are now commonplace within executive mandates.

frequently affect the form and content of the rulemaking methods being used.

As indicated in the foregoing chapters, proponents of regulatory negotiation claim that the process has the potential of incorporating the demands of all the "agendas" noted above. It satisfies the consultative agenda by providing affected stakeholders with the opportunity to be directly involved in a consensus decision making process. The fact that stakeholders share information and are involved in a problem-solving approach to the regulatory decision means that the basis, and hence the outcome, of the regulatory decision may be superior to that arrived at by conventional methods, thereby satisfying the analytic agenda. By requiring the participation of both the government agency as well as non-government stakeholders, the process also confronts the accountability agenda. While regulatory negotiation itself does not directly address the deregulatory and sunsetting agendas, the procedures developed for guiding the process may provide the agency with information about the need for regulation; for example, in the pre-negotiation stage, consultation with stakeholders may assist the agency in determining whether a regulation is required. Similarly, the procedures that have been recommended also provide for widespread public notice of the proposed regulation and the documentation and dissemination of the negotiations leading up to the agreed-upon regulation, so that this information is made generally accessible to the public. Finally, by its very nature, it provides a means whereby the goals of participatory democracy may be achieved.

4.1.2 Appropriateness of Reg Neg in Particular Situations

It is also recognized, of course, that regulatory negotiation is not appropriate for all situations. Determination of its appropriateness in particular rulemaking applications involves two levels of assessment. As described in Chapter 2.0, agencies considering the use of regulatory negotiation are advised to proceed through two stages of assessment before committing to the process. In the first stage the agency examines the proposed negotiated rulemaking situation to determine if there are any preliminary reasons that would automatically exclude regulatory negotiation. Automatically inappropriate occasions for the use of regulatory negotiation might include, for example, a lack of a sufficient number of mature issues, or issues that entail fundamental values,[250] or the urgency of the timing for the regulation (as might arise in regulations addressing life-and-death issues), or a lack of identifiable interests, and so forth.

A further assessment of the appropriateness of regulatory negotiation is provided for in the second stage of the procedures guiding the reg neg process. In this stage the situation is examined in terms of the "criteria" that have been developed, including number of interests, nature of the issues, incentives for stakeholders' participation, and agency commitment.[251]

In short, regulatory negotiation is not considered a panacea for the difficulties and considerations involved in drafting regulations. In fact, it has been estimated that it may

[250] Doniger (1988:4-5), for example, refers to an EPA decision not to negotiate siting criteria for low-level radioactive waste disposal sites as the idea foundered on the non-negotiability of the fundamental question of how much cancer risk is safe.

[251] *See* Harter 1982:46-551.

be appropriate in only a small subset of regulatory situations.[252] Nevertheless, it is an approach that is considered to offer substantial benefits to both the regulators and those being regulated.

4.2 Unintended Consequences of Regulatory Negotiation

A number of observations have been made about the unintended or indirect consequences, both negative and positive, of regulatory negotiation. One of the major negative concerns relates to the possibility that agencies will resort to a greater use of policy directives and other kinds of "administrative quasi-legislation"[253] to avoid the procedures involved in regulatory negotiation. If agency personnel are, as predicted, resistant to the idea of regulatory negotiation, and if it is anticipated by the agency that the public will be opposed to the government's position circumstances that are not uncommon) the agency may decide to by-pass the entire (matter by employing alternative ways of obtaining the desired policy effect. Although, as discussed in Chapter 3.0, the reg neg process may also be used to develop policy guidelines, under such circumstances it may be unlikely that the agency would choose to do so.[254] This possibility would have the unfortunate effect of driving agency policy even further from public review and comment.[255]

A second unintended consequence relates to a point made by Braithwaite (1987) in his comparison of British and American regulatory decisionmaking. While acknowledging the drawbacks of American litigiousness in regulatory matters, he notes that the world has, to a certain extent, benefited from the frequently highly adversarial and widely publicized litigation challenging regulatory decisions. He states that there is "a sense, for example, that some small nations like the Nordic countries, even Australia, may have better drug regulatory systems than either the United States or Britain despite their superior regulatory resources. The reason for the success of these small countries is that they piggyback on the fruits of American conflict and openness. They can dispassionately observe all of the blood-letting that occurs in the United States and then make a consensual decision in their own countries."

There are, of course, two responses to this dilemma. One is that all jurisdictions should participate in the benefits of regulatory negotiation, thereby minimizing the need for litigation to expose the issues, establish the facts, and clarify options. Secondly, it has been recommended that regulatory negotiation proceedings should be documented and disseminated so that others may have the opportunity to learn from the process how decisions were reached and why.

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[252] Zoll 1988:2.

[253] *See* Janisch 1991:100.

[254] This situation arose in Victoria, Australia, in response to the introduction of the *Subordinate Legislation Act*, reviewed in Chapter 3.0. As Craven (1990) reports, civil-servant response to the new consultative scheme was initially less than supportive and ways were found to avoid compliance with the mandatory statute.

[255] Janisch (1991:100-101) goes on to analyze what might happen if agencies were required to bring these "laws-which-are-not-laws" into the governance of administrative law procedures. The risk, he claims, is that if policies and guidelines were required to be subject to the same procedures that govern regulations, agencies may stop publicizing them, with the result that we would be back in what he refers to as Tennyson's `wilderness of single instances' and a subsequent lack of coherent and uniform public policy.

A third unintended consequence that may arise concerns disappointed expectations. It has been observed that regulatory negotiation tends to heighten people's expectations and is therefore sensitive to "upsets". Failure to reach consensus, particularly if the negotiations are contentious, may leave some participants disappointed and may worsen the agency's relationship with some of them.[256] On the other hand, it has been found that regulatory negotiation can result in a significant improvement in communication among groups that traditionally have had adversarial relationships.[257]

One final concern is that raised by Funk's argument reviewed in Chapter 1.0, to the effect that regulatory negotiation fails to represent the public interest. While the procedures that have been designed for the reg neg process are intended to preclude this possibility, it is possible that even full compliance with these principles and guidelines could result in a less-than-adequate regulation. One reason is, as Funk suggests, that the drive for consensus and private parties' satisfaction in reaching an agreement may not necessarily result in a decision that reflects the public interest. It is noted, however, that conventional methods involve the same risk (although perhaps for different reasons).[258]

4.3 Summary of Observations

The following observations summarize the major characteristics of regulatory negotiation.

- Regulatory negotiation is a type of ADR technique in which no third party plays a significant role in the determination of outcome.

- Regulatory negotiation is not to be confused with negotiated settlement. While both involve negotiation, regulatory negotiation is prospective in its orientation; its purpose is not so much to resolve specific disputes as it is to establish general rules that will influence behaviour.

- Regulatory negotiation is intended as a supplement and alternative to conventional methods of rulemaking such as consultation and hearings.

- Regulatory negotiation has four critical features:

    - it occurs at the "front end" of the development of regulations;

    - stakeholders meet face-to-face to present their positions and hear others' viewpoints;

    - decisionmaking with respect to the final draft of the proposed regulation is based on consensus; and

[256] Administrative Conference of the United States *Sourcebook* 1990:30.

[257] Thomas 1987.

[258] *See* Section 1.4.1.3, Political Validity, in Chapter 1.0.

- decisions reached through the negotiations are, as far as possible, binding.

- "Consensus" in the context of regulatory negotiation means that each interest represented at the table concurs in or at least does not oppose the resulting agreement.

- The purpose of regulatory negotiation is to produce better regulation politically, procedurally and substantively; by providing a means whereby parties with significant interests in a proposed regulation may have an opportunity to participate in the formulation of the regulation.

- The benefits of regulatory negotiation include:

  - an improved basis for regulatory decisionmaking and improved regulations;

  - less litigation, earlier implementation and greater compliance;

  - enhanced political validity of regulatory decisionmaking;

  - more cooperative relationships among interests and the agency; and

  - reduced time, money and effort.

- The drawbacks of regulatory negotiation are that:

  - it tends to be resource-intensive in the short term and requires adjustment in agencies' internal procedures;

  - it requires a substantial investment of time and resources on the part of public-interest groups, who may have a limited capacity to sustain the effort required to participate in the process particularly if these groups are involved in more than one negotiation;

  - because of its unfamiliarity to many stakeholders, it may have to overcome negative attitudes about what is involved in the process, including agency resistance to the idea;

  - it risks failing to represent the public interest; and

  - it is subject to manipulation by those who may be motivated to use the process for their own private goals.

- The procedures in regulatory negotiation involve four stages:

  - an assessment stage, entailing a careful evaluation of the appropriateness of using regulatory negotiation on the basis of the criteria that have been

developed for the process, including the nature of the subject matter being regulated; the number and nature of the issues involved; the time frame available for the development of the regulation; and the identification, availability and commitment of the affected interests;

- a pre-negotiation stage, entailing two convening phases: first, a convenor conducts a more in-depth assessment of the above criteria and prepares the parties for the negotiations; in the second phase, the agency and the convenor arrange publication of the notice of intent to negotiate, select a mediator and make any adjustments arising from the notice;

- a third stage, entailing the actual negotiations including both procedural and substantive negotiations; and

- a fourth stage, involving closure and follow-up (e.g., assessment of the process and monitoring of the implementation of the agreement).

4.4 Present and Future Considerations: A Canadian Perspective

Regulatory negotiation represents a promising supplement to conventional rulemaking methods. Particularly in the current political and economic climate, strategies that support innovation, competitiveness and sustainable development in regulatory sectors are needed and, moreover, would be welcomed. In its recent report, "Canada: Meeting the Challenge of Change", the Canadian Labour Market and Productivity Centre (1993:43) observes that:

> [T]raditionally there has been little consensus between business and labour in Canada on the most appropriate thrust and mix of [public policies and programs]. Business and labour have differed, as well, on the most appropriate policy tools to carry out their goals. Labour tends to prefer legislation, regulation and enforcement . . . while business prefers incentives, voluntary guidelines and timetables.
>
> In part, these differences have been a result of limited discussion between business and labour concerning these areas of public policy. While there have been periodic attempts at such efforts at the federal and provincial/ territorial levels, they have been mostly ad hoc in nature. In addition, governments too frequently have appeared to ignore the results of even these limited efforts . . .
>
> . . . governments should recognize that, if business and labour are to adopt new roles, governments must do the same. Governments must be prepared for a permanent change in their relationship to business and labour, both by accepting their advice on public policy and by supporting consultative mechanisms.

Along similar lines, the Ontario Round Table (1992a) recognizes the need for greater consensus-building between traditionally opposed interest groups, such as environmental protection groups and industry, in order to foster the goal of sustainable economic development.

Regulatory negotiation is a procedure designed to bridge the gap left by the unilateral attempts of opposing interests to influence government policy.[259] It offers a means whereby mutual problem-solving may provide greater options and more innovative and acceptable solutions to policy issues in various regulatory sectors.

While there has been a substantial amount of experience with regulatory negotiation in the United States, reg neg is relatively untried in Canada, apart from various applications of the negotiation process in areas other than rulemaking. Moreover, the regulatory decisionmaking context in Canada is different from that in the United States and consequently, there is a need to examine the process in terms of the peculiarities of Canadian procedures and orientations. In Chapter 3.0, a number of issues were raised that deserve further discussion and exploration if the process is to be pursued by Canadian government agencies.

Accordingly, based on the observations contained in this report, the following suggestions may assist in the development of a stronger foundation for regulatory negotiation in Canada.

4.4.1 Educational Initiatives

It has been observed that understanding of regulatory negotiation is uneven within federal and provincial/territorial government agencies. Most basically, this includes not only an understanding of just what constitutes regulatory negotiation, but also its benefits and drawbacks, its purpose, and procedural methods; that is, the points covered in Chapters 1.0 and 2.0 of this report. *Accordingly, it may be useful for the Department of Justice to provide a series of workshops or seminars on regulatory negotiation for senior officials in regulatory agencies or departments. These workshops should include speakers who have had working experience with the regulatory negotiation process.*

4.4.2 Incentives for and Enhancement of the Reg Neg Process

4.4.2.1 Reg Neg Pilot Projects

Chapter 3.0 reviewed a number of suggestions regarding incentives for the use of regulatory negotiation. Among the obstacles to the use of regulatory negotiation in Canada is what has been called agency resistance. Bureaucratic resistance to new methods is not uncommon.[260] The source of this resistance may be varied and therefore

[259] The imagery that is sometimes used here is one in which a wheel, with the agency at the hub and the different interests represented by the spokes of the wheel, is converted into a pie with all the pieces (the various interests) in contact with each other. Conversation with Mr. Stephen Owen, April 6, 1993.

[260] *See* Craven 1990 and Administrative Conference of the United States *Sourcebook* 1990.

its diminution may require a number of strategies. Certainly one source of resistance is a lack of knowledge. The educational seminars mentioned above would be one way of addressing this problem.

Another approach could be to undertake a limited number of pilot projects employing regulatory negotiation, as was done initially by EPA in the United States. As pointed out in Chapter 3.0, one of the most convincing incentives for regulatory negotiation would be a couple of good examples of how it has worked. *Accordingly, it is suggested that the Department of Justice, through its Dispute Resolution Project and in conjunction with the Regulatory Compliance Project, consult with regulatory departments to find two or three appropriate situations in which regulatory negotiation could be undertaken*.[261]

4.4.2.2 Conventional Rulemaking Case Studies

In relation to the foregoing suggestion, it is important to note that there is very little information available about the pros and cons of conventional rulemaking methods. Insofar as regulatory negotiation is an alternative to conventional methods, it is important to ask and collect information on the question: Alternative to what? In the United States, for example, a great deal of information is available about conventional rulemaking methods. In Canada, on the other hand, while academic articles discuss many aspects of the regulatory process, these are normally oriented to particular points of view or a discussion of specific underlying theses. Undoubtedly, information about agencies' rulemaking methods is available within regulatory agencies themselves and the Auditor General's Department, but this information is not publicly available.

What is required is an objective account of how regulatory agencies conventionally proceed in their regulatory decisionmaking: the steps taken; the problems encountered; the strengths and weaknesses of the process; the outcomes resulting from the regulation, including litigation and compliance rates. As Latin (1985:1303) has pointed out, there is little value in comparing idealized accounts of either regulatory negotiation or conventional rulemaking methods with each other and then expecting to be able to make realistic choices. *With this in mind, it is suggested that, in conjunction with the foregoing pilot projects involving the use of regulatory negotiation, a number of case studies be conducted on the conventional methods of formulating regulations.*

Related to the foregoing research, it has been observed that the quality of regulatory impact analysis statements (RIAS) is often poor. In contrast, the Australian RIAS are said to be superior. *It is suggested that an evaluation of RIAS be undertaken to determine their quality and usefulness, and to make recommendations about improvements, if required.*

[261] In the United States, before any guidelines were developed, three successful pilot cases were undertaken. Conversation with Mr. Lee Doney.

4.4.2.3 Supportive Infrastructure for Reg Neg

Clearly, American regulatory agencies have greatly benefited from the guidance and services offered by the Administrative Conference of the United States (ACUS). The services provided by ACUS include an information clearinghouse; a roster of mediators and facilitators; some funding for travel and other costs associated with regulatory negotiation; and consultative services regarding, among other things, the reg neg process. It will be recalled that the Ontario Round Table has recommended that a "mediation agency" be established to assist with consensus processes. In Canada, there is no agency comparable to ACUS. *It is suggested, therefore, that consideration needs to be given to the creation of such an agency, or to other means of providing the benefits derived from ACUS.*[262]

Two other conditions necessary for the effective implementation of regulatory negotiation are funding, and qualified mediators and facilitators. The meaningful participation of stakeholders in regulatory negotiation requires a source of neutral funding for those who cannot afford the costs of equal participation. Consideration needs to be given to the source of this funding. With respect to third-party neutrals, it is noted that there may not be enough qualified neutrals trained in the skills of "negotiation on the merits" or "principled negotiation"; nor does there appear to be sufficient training available in this area. *It is suggested, therefore, that the Department of Justice, in conjunction with the Regulatory Affairs Secretariat and other relevant departments and organizations, examine ways to provide funding and training for regulatory negotiation.*

4.4.2.4 Other Incentives

Because regulatory negotiation is relatively new in Canada, there is a need to explore innovative ways of encouraging the process. It will be recalled that in Chapter 3.0, a number of suggestions were made: for example, that the Regulatory Affairs Secretariat might consider reviewing negotiated regulations before other conventionally formulated regulations. In addition, it has been suggested that regulatory agencies could foster the use of regulatory negotiation by minimizing the presence of BATNAs (e.g., through the discouragement of lobbying, providing deadlines and communicating government fallbacks).[263] There may well be other incentives that could be used to encourage the use of regulatory negotiation. *It is suggested that the Department of Justice, in consultation with regulatory agencies and ministries, explore further means of encouraging the use of regulatory negotiation.*

4.4.3 Legislative Discussion

Resistance to regulatory negotiation also stems from fears about the legitimacy of the process. As noted in Chapter 3.0, it has been suggested that reg neg legislation could

[262] The value of an agency similar to ACUS was noted by a number of spokespersons interviewed for this report. Mr. Glenn Sigurdson, for example, observed that one of its strengths is that it is a nonpartisan agency with no alliance with government or public interests.

[263] Conversations with Ms. Wendy Frances, Mr. Stephen Owen and Mr. Bill Diepeveen.

legitimize the process and provide official authority for its use, as well as guidelines about how to proceed. On the other hand, there are a number of arguments against legislation, including the views that it could reduce flexibility, upset the consensual balance required for regulatory negotiations, and prematurely codify the process. As well, while it is recognized that the United States *Negotiated Rulemaking Act* (which was enacted in connection with the *Administrative Dispute Resolution Act*)[264] emerged out of legal context underpinned by a number of statutes governing administrative procedures, the administrative law context for a Canadian reg neg statute is unclear.

In short, the advisability of creating a reg neg statute requires further discussion and clarification of the issues involved. Alternative suggestions, such as the creation of reg neg guidelines or adoption of the Australian consultative model, also deserve further discussion. *It is suggested that the Department of Justice organize additional workshops to canvass opinion and discuss the advantages and disadvantages of reg neg legislation, its content and orientation, and/or alternative methods of providing legitimacy for regulatory negotiation.*

4.4.4 Federal Leadership

One of the most frequent comments heard in conversations with Canadian spokespersons on regulatory negotiation was the need for leadership from the federal government in this area; the fact that the Department of Justice was investigating the subject was widely welcomed. *It is suggested, therefore, that the Department of Justice assume a leadership role in relation to the development of regulatory negotiation in Canadian jurisdictions. Activities undertaken by the Department in this regard might include:*

- *regular dialogue workshops on the subject of regulatory negotiation, with focused workshops on areas that are found to be of particular interest or concern to federal and provincial regulatory officials and other relevant groups (e.g., the provincial and national Round Tables,[265] third-party neutrals, business and industry representatives, public-interest groups, representatives from universities and other accreditation institutions);*

- *the dissemination of information on regulatory negotiation, including findings that may emerge from any of the foregoing suggested studies and evaluations; and*

- *guidance with respect to the application of the reg neg process in contexts other than rulemaking.*

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[264] Conversation with Mr. Chris Kirtz, April 7, 1993. The United States *Administrative Dispute Resolution Act* takes a very proactive approach to the use of ADR techniques. It authorizes senior officials to be responsible for investigating alternatives to traditional methods of dispute resolution; i.e., it gives them a mandate to be proactive.

[265] Some of those interviewed for this study pointed out that they would like to see some continuity in the different efforts that are being directed towards consensual processes.

4.5 Summary of Recommendations

Recommendation 1

The Department of Justice should provide a series of workshops or seminars on regulatory negotiation for senior officials in regulatory agencies or departments. These workshops should include speakers who have had working experience with the regulatory negotiation process.

Recommendation 2

The Department of Justice, through its Dispute Resolution Project and in conjunction with the Regulatory Compliance Project, should consult with regulatory departments to find two or three appropriate situations in which regulatory negotiation could be undertaken.

Recommendation 3

In conjunction with the foregoing pilot projects on regulatory negotiation, the Department of Justice should consult with regulatory departments to determine possible candidates for case studies of conventional methods of formulating regulations.

Recommendation 4

An evaluation of the quality and usefulness of regulatory impact analysis statements should be undertaken, including recommendations for improvements, if required.

Recommendation 5

Consideration should be given to the creation of an agency equivalent to the Administrative Conference of the United States (ACUS), or to other means of providing the benefits derived from ACUS.

Recommendation 6

The Department of Justice, in conjunction with the Regulatory Affairs Secretariat and other relevant departments and organizations, should examine ways to provide funding and training for regulatory negotiation.

Recommendation 7

The Department of Justice, in consultation with regulatory agencies and ministries, should explore further means of encouraging the use of regulatory negotiation.

Recommendation 8

The Department of Justice should organize workshops to canvass opinion and discuss the

advantages and disadvantages of reg neg legislation, its content and orientation, and/or alternative methods of providing legitimacy for regulatory negotiation.

Recommendation 9

The Department of Justice should assume a leadership role in relation to the development of regulatory negotiation in Canadian jurisdictions. Activities undertaken by the Department in this regard might include:

- regular dialogue workshops on the subject of regulatory negotiation, with focused workshops on areas that are found to be of particular interest or concern to federal and provincial regulatory officials and other relevant groups (e.g., the Canadian provincial and national Round Tables, third-party neutrals, business and industry representatives, public-interest groups, representatives from universities and other accreditation institutions);

- the dissemination of information on regulatory negotiation, including findings that may emerge from any of the foregoing suggested studies and evaluations; and

- guidance with respect to the application of the reg neg process in contexts other than rulemaking.

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APPENDIX B
ACUS RECOMMENDATIONS 82-4 AND 85-5

(This Appendix is not presently available)

APPENDIX C
UNITED STATES *NEGOTIATED RULEMAKING ACT*

(This Appendix is not presently available)

APPENDIX D
REGULATORY NEGOTIATION FOR THE *CEAA*

BACKGROUND

The federal *Canadian Environmental Assessment Act (CEAA)* was passed in June 1992. The purposes of the *Act* are to:

- ensure that the environmental effects of projects receive careful consideration before the projects are approved;
- encourage sustainable development;
- ensure that projects do not cause significant adverse environmental effects outside the jurisdictions in which the projects are carried out; and
- ensure opportunities for public participation in the process.

In the latter part of 1991 consultations with stakeholders revealed that what was desired for this *Act* was a consensual method of developing regulations. This view lead to the creation of the Regulatory Advisory Committee (RAC). The primary function of RAC is to advise the Minister of the Environment on draft regulations and guidelines for the *CEAA* and to achieve consensus, or identify different viewpoints, on their content. RAC discussions are also intended to assist the government in understanding the implications of various regulatory options[266].

THE RAC REG NEG PROCESS

The RAC reg neg process has been described as a "qualified success".[267] A number of important decisions were reached via the consensus process, and guidelines were developed for the resolution of undecided issues. The negotiations themselves continued for almost two years in which the Committee met six times (in addition to conference calls and working group meetings) and directly involved about twenty participants as well as other representatives from federal departments who observed the proceedings.

It will be recalled from Chapter I that the essential features of regulatory negotiation include: it should occur at the "front end" of the development of regulations; stakeholders meet face-to-face to present their positions and hear others' viewpoints; decisionmaking is based on consensus; and decisions reached through the negotiations are, as far as possible, binding. In

[266] Canada, *Canadian Environmental Assessment Act* Regulatory Advisory Committee 1993:3. This report is hereafter referred to as the RAC Report.

[267] Interview with Mr. Lawrence Alexander, Senior Policy Advisor, Federal Environmental Assessment Review Office (FEARO), October 4, 1993 in which Mr. Alexander expressed the views of others who were involved in the process.

addition, a number of conditions have been recognized as important for the ultimate success of the negotiations. For example, it was noted that the face-to-face meeting of stakeholders ought to ensure that representatives from *all* significant interests are present and that there are a sufficient number of interests available for consideration and negotiation.[268]

With respect to the first condition that the process occur at the "front-end" of the drafting of regulations, it is clear that this was what occurred. As indicated above, early consultations with stakeholders revealed that they were interested in a consensus decisionmaking process for the development of these regulations.

The second condition, however, was more difficult to institute. As mentioned, there were approximately twenty participants in the negotiations, representing a much larger number of interests. A broad characterization of the interests includes: environmental groups (ENGO's), the Native community, industry and federal and provincial/territorial government ministries. After the initial consultations, an attempt was made to strike a balance between environmental, industrial and government interests. In all, there were four ENGO representatives, two representatives from the Native community, six industry representatives, four provincial/territorial representatives and two members of FEARO (including the Chair of the proceedings) who represented federal interests.[269]

On hindsight it appears that the representation of federal interests might have been handled differently. In fairness, however, the situation ought to be understood within the context of the nature of the regulations being negotiated. Theoretically, the number of interests that could be affected by the regulations is very large because of the scope of the *CEAA*. For example, the initial list of potential statutory candidates for environmental assessment for the *Law List* regulation included over 1000 possible statutes or authorized government duties covering such interests as aviation, military, aboriginal, agriculture, fisheries, health, mining, atomic energy, petroleum, water resources, national parks and so on. Clearly, it would not have been possible to include representatives from each of these potentially diverse interests. Moreover, it was agreed at the outset that FEARO would represent federal interests. Nevertheless, it appears that it was difficult for FEARO to represent all federal interests and the process could have benefitted from other federal government representatives sitting at the negotiating table.

The agreements reached during the process were made by consensus decisionmaking. The Committee began by developing ground rules and operational procedures to cover the proceedings.[270] One of the first tasks for the Committee was to define its purpose. It then went on to develop ground rules concerning the operation of the meetings, member responsibilities, the creation of working groups, confidentiality, dealing with the media, and last, but certainly not least, a definition of consensus.

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[268] *See* Chapter 1, p. 9.

[269] At the beginning of the process, federal government departments were asked if they would like to participate in the negotiations or whether they would prefer to have their interests represented by FEARO with the option of sitting in to observe the proceedings. Federal agencies chose the second option.

[270] These procedures are presented at the end of this appendix.

The final requirement for the implementation of regulatory negotiation concerns the condition that decisions reached via consensus should, where possible (i.e., providing the drafted regulations conform with existing law), be binding. As current media coverage has shown, there has been a difference of opinion with respect to whether the federal government has reneged on its commitment to the process and the consensual agreements achieved by RAC. One point of view maintains that the government has failed to live up to its commitment; others maintain that the only changes made by government relate to areas in which consensus was not achieved. Without further adding to the debate in this matter, one lesson that may perhaps be learned from the RAC process is that there is a need for participants to be very clear about what their expectations are regarding government action resulting from their consensual decisions.

This report on regulatory negotiation has emphasized the importance of securing the commitment of senior government officials to regulatory negotiations. It is recognized that it may be difficult to do so given the relative "newness" of the process and resulting resistance among government officials. Nevertheless, the overwhelming importance of the condition that the parties to the process negotiate in 'good faith' on the understanding that their efforts will be implemented is underscored by the RAC experience. In the United States, similar experiences have resulted in the suggestion that the ground rules developed at the beginning of the negotiations should include the condition that if the government decides to change or ignore the recommended regulation, it must provide written reasons to the negotiating committee. In the present situation, although reasons were given from the RAC's perspective, there were some concerns as to the propriety of these reasons.

THE NEGOTIATIONS

There are four regulations (out of about fifteen or more potential regulations for the *CEAA*) that were considered to be very important for the proclamation of the *CEAA* because they essentially identify the scope of the *Act.* These four regulations have been negotiated by RAC[271] :

- The *Comprehensive Study List* regulation identifies projects and classes of projects which are likely to have significant environmental impacts and would therefore require comprehensive study of their environmental effects;

- The *Law List* regulation which makes clear which federal regulatory decisions (e.g., stemming from other federal statutes and regulations) are subject to environmental assessment under *CEAA* and, by implication, which are not;

- The *Exclusion List* regulation which sets out projects or classes of projects that do not require an environmental assessment because the adverse environmental effects are insignificant; and lastly,

[271] Obviously the regulations referred to here are much more complex than would be deemed from the description provided here. However, a brief description of these regulations has been provided to give the reader a more simplified overview of the substance of these regulations.

- The *Inclusion List* regulation which identifies those projects which by nature of the activities involved (as opposed to the physical works involved) also require environmental assessment; and are deemed to be projects under the Act (e.g., removal of timber from certain federal lands or low-level flying of military jet aircraft).

The RAC regulations developed so far represent unusual regulatory negotiation in that the subject matter of the regulations entails essentially **lists** of licenses, permits and projects requiring environmental assessments. The negotiations involved in the creation of these regulations, therefore, are not very typical of what might be expected from other kinds of regulations.

While it is not the purpose of this review to discuss substantively the outcome of the RAC regulatory negotiations, it is noted that RAC did produce a number of positive outcomes and represents perhaps the first Canadian attempt at regulatory negotiation.

The Committee began its substantive negotiations by developing four critical criteria for the development of its recommendations for the regulations. Although the Committee had `inherited' a list of potential statutes for inclusion in the *Law List* regulation derived from the consultations that were held prior to the negotiations, it was quickly recognized that it would not be productive to discuss each individual candidate statute on its merits but what was required instead was a set of over-arching criteria that would guide the negotiations. Hence, the RAC criteria developed for this purpose were:

- the draft regulations must be legal;
- the draft regulations must be technically feasible;
- the draft regulations must be administratively practicable; and
- the draft regulations must take into consideration economic implications and the requirement to develop a Regulatory Impact Analysis.

In addition to these four general criteria, other criteria were consensually developed specifically for the development of each of the regulations.[272] Although there was no overall consensus achieved for all of the items in the regulations, the Committee did produce a "convergence of views regarding the criteria and much of the content of all four regulations Moreover, consensus has occurred on many specific items within each regulation".[273] Where consensus was not achieved, RAC produced a report outlining the areas of disagreement and a list of recommendations on which there was consensus about how the government could proceed.

LESSONS LEARNED

[272] *See* the RAC Report 1993.

[273] *See* RAC Report 1993:32.

The RAC experience with regulatory negotiation underscores some of the points that have been made in the main body of this report. While recognizing that there is some debate about the degree to which any of these observations apply to the RAC process, these points may be summarized as follows:

- It is essential to have a commitment to the process at the most senior level of government. Concomitantly, representation of government interests at the table is also essential.[274]
- Representatives of major interests should each have a mix of skills including substantive knowledge of the issues, negotiating skills and interpersonal skills.[275]
- The third party neutral should also have substantive knowledge of the subject of the negotiations.
- Access to legal counsel is critical to the efficiency and success of consensus decisionmaking process.[276]
- Representatives ought to have established protocols for communication with their constituencies and clarity about their mandates.
- The use of working groups can greatly facilitate the process.
- The creation of clear and comprehensive ground rules and procedures is essential to the process.[277]
- The creation of a reasonable deadline is also critical to the process.
- Federal legislation or policy guidelines would facilitate the process by legitimizing it and providing procedural guidance.
- Any changes to the agreements must be made jointly at the negotiating table; changes may not be made unilaterally.

The following pages contain the *CEAA* Regulatory Advisory Committee Operational Procedures (Source: the RAC Report 1993).

[274] It is not uncommon for government officials to resist the idea of being "just another stakeholder". For example, provincial government authorities are accustomed to seeing themselves as equal partners with the federal government. In this kind of process, however, government interests are simply one of many potential interests and the appropriate role for government officials is not that of a "neutral" but as an equal participant at the table.

[275] According to the facilitator and the Chairperson for this process, representatives should ideally have had previous experience in multi-stakeholder dialogue. Moreover, according to the facilitator, the importance of interpersonal skills cannot be underestimated. In her experience, an often overlooked factor in negotiations is the "human element" which can either undermine or greatly assist the negotiated process and outcome. Conversations with Ms. Susie Washington and Ms. Karen Brown.

[276] The Department of Justice must be prepared to offer legal opinion with respect to the legislation authorizing the regulations being negotiated.

[277] For example, in the RAC process industry attempted to lobby the government during the process until ground rules were developed prohibiting this activity.