



# Technical Notes

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## Negotiated Rulemaking: A Participative Approach to Consensus-Building for Regulatory Development and Implementation

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Regulations are a common mechanism used by governments to guide and facilitate the implementation, management, and enforcement of policy change. Through regulations, governments establish the rules that specify, control, and direct compliance with new decisions. However, if these rules are not complied with as intended, policy implementation may not proceed smoothly. *Research has shown that the effectiveness of many regulations is strongly influenced by the process by which they were initially formulated.* This paper describes a participative process used to formulate regulations successfully.

The traditional process of regulatory development is typically top-down. Government initiates, formulates and proposes the rules. In centralized or closed systems, regulations are imposed; in more open systems, groups or individuals may comment on the proposals in public hearings, but with little possibility of making major structural and functional modifications to the regulations. This process, while well-intentioned, often leaves civil society stakeholders feeling far removed from the process and disempowered. They may feel that they have minimal voice in designing the regulations, standards and provisions that must be obeyed, and, as a result, compliance may be low and enforcement costs high -- a double-edged sword.

Stakeholder reactions to top-down regulatory development can have negative implications, as observed in a variety of countries (Pritzker and Dalton, 1995). If penalties are increased to discourage noncompliance, businesses may migrate into a "shadow economy," thereby fueling corruption, reducing tax revenues and evading the regulatory regime altogether. In some societies, lengthy and costly litigation in the courts is sometimes pursued by civil society groups to modify or eliminate imposed regulations. Antagonistic and adversarial relations between regulatory agencies and the regulated parties may ensue, resulting in delay or outright disregard for the regulation's intent. The lack of effective and frank dialogue between the regulators and the regulated is usually blamed for these negative consequences.

### Regulation through Negotiation

There is an alternative approach to the traditional process of regulatory formulation and implementation – *negotiated rulemaking* or *regulatory negotiation (reg-neg)*. Negotiated rulemaking brings together affected stakeholder groups with the relevant government agency and a neutral mediator or facilitator to build a consensus on the features of a new regulation *before* it is proposed officially by the agency. Regulatory provisions are developed as a bottom-up participatory process of negotiation.

Negotiated rulemaking is a fully collaborative process, in which all interested groups – government, business and citizen groups -- are convened in an “Advisory Committee.” Key issues and concerns are identified, the interests of all sides are compared and contrasted, negotiations take place, and hopefully, agreements based on consensus are developed.

In the United States, negotiated rulemaking became an officially recommended approach to develop new regulations by federal government agencies in 1990 when the Negotiated Rulemaking Act (5 U.S.C. 561-570) was passed by Congress. A September 1993 Executive Order from the White House requires all federal agencies to consider applying negotiated rulemaking strategies in future regulatory actions. However, the approach has been used informally by government agencies since the 1970s. The Department of Labor, the Environmental Protection Agency (EPA), and the Department of the Interior, are its principal proponents. By far, the EPA has been the most frequent user of negotiated rulemaking. Over 50 federal negotiated rulemaking cases have been documented between 1982 and 1995; many more applications have been conducted in the United States at the state level (Pritzker and Dalton, 1995). Examples of environmental regulations developed using negotiated rulemaking in the United States include:

- Penalties for businesses for noncompliance with the Clean Air Act.
- Exceptions for licensing pesticides.
- Performance standards for wood burning stoves.
- Controls on volatile organic chemical equipment leaks.
- Standards for transporting hazardous wastes.
- Standards for chemicals used in manufacturing wood furniture.

The negotiated rulemaking approach has been applied in other countries as well. The Council of State and the Economic and Social Council in France, the Socio-Economic Council and Labor Foundation in the Netherlands, and the Council of State in Greece, have all applied consensus-building approaches to rulemaking (Perton, 1997). Japanese and German business and government leaders develop health and safety regulations collaboratively through negotiation

and still arrive at stringent standards (Reich, 1981). Negotiated regulatory development has been practiced in New Zealand as well since 1985. Their approach dictates that a “regulatory impact statement” be prepared by the government regulatory agency to assess the likely costs and benefits of the regulation ahead of time (Perton, 1997). The procedure includes exploration of “alternative compliance mechanisms” by which the regulated parties can propose and negotiate options on how they will comply with future regulations without degrading regulatory standards. Regulatory reform developed using consensus-building and negotiations is also being introduced into the transitional economies in Eastern Europe and the Newly Independent States by Western and international donor agencies (Moore, 1993).

The experience with negotiated rulemaking in the United States has produced several benefits (Pritzker and Dalton, 1995):

- While negotiated rulemaking takes more time and effort upfront than traditional modes of developing regulations, all the stakeholders, including government agencies, are more satisfied with the results.
- Participants find that with a negotiated process, the resulting regulations tend not to be challenged in court. (In contrast, about 80 percent of all EPA regulations have been challenged in court and about 30 percent have been changed as a result.)
- Less time, money and effort are expended on enforcing the regulations.
- Final regulations are technically more accurate and clear to everyone.
- Final regulations can be implemented earlier and with a higher compliance rate.
- More cooperative relationships are established between the agency and the regulated parties.

### **Favorable Conditions for Negotiated Rulemaking**

Certain societal conditions facilitate the application of negotiated rulemaking procedures. These include the existence of democratic procedures, an independent judiciary, basic governance capacity, and enforceable contracts. Given these conditions, civil society is

likely to trust that its voice will be heard and the results of the process implemented in good faith. Practitioners considering this approach must also ask some basic questions:

- Is there a willingness to negotiate? The major stakeholders must be willing to negotiate and show some flexibility in their interests and position. One major motivation to negotiate a regulation's provisions is the belief that a better and more enforceable solution will be reached through negotiation than through the traditional top-down approach.
- Is this the ripe moment? The issues must be ripe for decision. The issues need to be known and commonly understood. Both governmental and non-governmental parties need to be motivated to reach a mutually acceptable solution because of either impending and overwhelming costs that are predicted if they do not reach agreement *or* imminent and compelling rewards that will be made available if they do.
- Is the process perceived to be fair? The stakeholders must believe that the venue and atmosphere of the proposed negotiations will be fair and will enable each party to have an equal voice. There needs to be confidence that the playing field is level and that no party will dominate the talks. Moreover, the history of the issue and the history of past interactions among the stakeholders must suggest that any prejudices or biases among the parties can be overcome.

If these conditions are not met – if any of the parties believe that they can achieve their goals without the cooperation of the other stakeholders and at lower cost, they are not likely to be motivated to engage in negotiated rulemaking procedures. However, if they are interested in sustainable results that are not perceived as being imposed by more powerful stakeholders, instituting a negotiated rulemaking process is likely to be viewed as appropriate and can motivate the parties to come to the negotiating table.

### **Practical Procedures**

How is negotiated rulemaking carried out in industrialized countries? There are several steps:

#### Step 1. Diagnose the Issue

The regulatory agency begins by conducting a preliminary assessment that examines the issue, the stakeholders, their interests and priorities, and the likelihood of success in applying negotiated rulemaking. If the issues are very contentious, there is a history of strong stakeholder animosity or interests are highly divergent, the agency may decide not to use this regulatory negotiation process.

#### Step 2. Select the Facilitator

Selection of the “right” facilitator is critical to the success of the process. Making this selection is usually the responsibility of the regulatory agency that makes public, at this juncture, its intention to proceed with the negotiated rulemaking process. The facilitator must be perceived as a neutral and objective party trusted by all stakeholders and is usually selected from outside the organization. He/she must have both issue knowledge as well as process skills.

#### Step 3. Identify the Stakeholders and Obtain their Commitment to the Process

The major stakeholders need to participate in the negotiations and be a part of the consensus if the process is to be a success. The identification of stakeholders is the responsibility of the facilitator, who must determine their willingness to participate in the process and their capacity (training, infrastructure and knowledge) to negotiate as equal partners. Commitment, capacity, and interest are the key criteria for selection. Certainly, who gets to sit at the negotiation table is a critical decision on which there needs to be early agreement. Each party needs to be contacted individually by the facilitator to pledge commitment to the process. The facilitator can then help prepare the parties for the upcoming negotiation by holding preliminary fact-finding meetings with each stakeholder.

#### Step 4. Establish the Advisory Committee

An Advisory Committee needs to be established and convened by the facilitator as the body that will negotiate the regulatory provisions. Its membership consists of the stakeholders who have agreed to participate, including representatives from the regulatory agency (25 or fewer participants have been found to be the ideal number). Adequate resources should be pledged to enable the Committee to

conduct its work. The relevant regulatory agency usually provides the financial support, but must be careful not to influence the process so as to ensure the independence of the Committee's deliberations. Fact-finding, preparation and planning are essential elements of a reasoned process. Coming to a common understanding of the facts underlying the issues is a first step toward finding fair and appropriate agreements. The ultimate goals and anticipated products of the negotiation should be agreed among the Committee's members as the process commences. Deadlines, too, should be established by the Committee to stimulate reasonable progress in the talks.

#### Step 5. Conduct Negotiations

The negotiations are characterized by several activities:

- The issues, interests and priorities of each of the stakeholders must be discussed openly by the Advisory Committee. Placing a diversity of issues on the table will yield a negotiation with more room to compromise and conduct tradeoffs.
- Points of agreement and points of difference must be identified.
- The negotiation must search for ways to resolve differences through creative problem-solving, tradeoffs among issues, analogies to similar regulatory solutions, etc.

Throughout the negotiations, the facilitator should serve the role of stimulating the debate in the Committee – getting the parties to discuss their interests rather than their formal positions, highlighting points of commonality among the parties, and identifying solutions that will not cause stakeholders to compromise their fundamental values.

#### Step 6. Develop Consensus around a Single Text

Throughout, the facilitator needs to encourage the Committee to develop a single consensus text acceptable to all stakeholders. This document must address the key issues and interests of all stakeholders and present solutions that all can comply with and “sell” to their individual constituencies. One way to generate such a document is for a small subcommittee to volunteer to write it, incorporating multiple perspectives and proposals and expecting that it will

serve only as a jumping off point for further negotiation and creative compromise.

#### Step 7. Present the Resulting Negotiated Agreement

When the Committee reaches consensus, it transmits its conclusions to the regulatory agency. This can be in the form of a draft regulation, a report or recommendations. If a consensus could not be reached, minority reports may be filed along with the majority's findings. What the agency does with this input depends on what was originally promised when the negotiations began. Usually, the negotiated results are published and disseminated by the regulatory agency, which must be ready to act in good faith upon the results of the Committee.

#### **An Example**

An example helps to illustrate how negotiated rulemaking procedures work in a practical sense. One recent application involved the development of regulations in the United States concerning the emission of hazardous air pollutants from wood furniture manufacturing operations (NPCA, 1995). A two year negotiating process involving representatives from industry, nongovernmental environmental groups, and state and federal government officials, resulted in a proposed regulation published by the Environmental Protection Agency (EPA). This proposal was then open for public comments and hearings prior to promulgating the final rule. The Advisory Committee consisted of 23 members – representing 11 businesses (both large and small), three business associations, four environmental policy action groups, four state government environmental agencies, and the EPA. Two facilitators supported the Advisory Committee's work.

Even three years before the Advisory Committee was established, the industry association recognized that new emissions regulations soon would be required by EPA. In anticipation, the association commissioned a fact-finding study and began discussions with EPA that generated the negotiated rulemaking approach. Over an initial period of six months, plenary meetings of the Committee examined several issues including a protocol for the negotiations, reconciliation of industry and EPA data bases, enforcement, industry segmentation, and the relative toxicity of the pollutants. Once the facilitators determined that there was significant consensus on most of the issues, small work groups, consisting of the Committee's members, were formed to negotiate the remaining outstanding

issues. These small groups were able to focus on particular issues simultaneously, speeding the process.

The draft regulation resulting from the negotiation yielded some novel provisions. A new measurement protocol for the pollutants was developed that was seen as a tool to encourage technological advances in the industry at the same time as it helped to limit emissions. The regulatory results also offered support to small furniture manufacturers that excused them from some of the more burdensome regulatory requirements. It could be said that the negotiation format stimulated new ideas for the proposed regulation that synthesized the interests of all the stakeholders, while still protecting the public interest represented by the regulatory regime.

### Cultural Issues

To date, the application of negotiated rulemaking in developing countries or transitional economies is not a common occurrence. But that is not to say that similar consensus-building, negotiation and mediation procedures do not already have deep cultural roots in all countries of the world. In fact, there is a growing literature on traditional conflict resolution approaches, which all bear some resemblance to Western approaches, but also some cultural uniqueness (Zartman, 1998; Faure, 1998). In Africa, for example, two frames of reference for traditional conflict resolution patterns is the practice of family or neighborhood negotiation facilitated by elders and the attitude of togetherness in “the spirit of humanhood” (Malan, 1997).

Practitioners need to consider several issues that may lead them to consider adjusting and tailoring negotiated rulemaking as it is practiced in the West before applying it elsewhere (Susskind, in Martin and Hamacher, 1997):

- Legitimacy – In the West, legitimacy and acceptability for neutral facilitators is based on their professional expertise, reputation, experience, and objectivity. However, in other countries, neutrality may not provide the facilitator with credibility. Instead, factors such as social standing, resources, leverage, and age may be more important legitimizers.
- Transparency – Open and accountable decision-making fora are expected in the West, but in

other countries with different traditions and histories, such fora may be rare or unacceptable.

- Commitment – Negotiated rulemaking in the West produces a contractual arrangement to ensure that commitments are honored. In other countries, where traditional, informal bonds of trust are at the basis of relationships, such legalistic outcomes might be inappropriate.
- Role and responsibility of government – In the West, there are generally accepted public notions of the role for government in generating and enforcing regulations. In other countries, the balance between economic development and regulation may not be so clear; the need for stimulating rapid economic growth may take precedence over regulations that constrain business, even for admirable social objectives.

In the end, practitioners may decide that negotiated rulemaking is not an appropriate regulatory development mechanism for a particular issue or in a particular cultural setting. However, the procedure should be considered as an adjustable framework that promotes participatory engagement in regulatory development and, as such, its processes can be modified to accommodate local needs or traditions.

### Costs and Benefits

Why use negotiated rulemaking? What are the implications for policy reform, the implementation of policy changes, and conflict between stakeholders and government? First, the process generates an *environment for dialogue* that facilitates the reality testing of regulations before they are implemented. It enables policy reforms to be discussed in an open forum by stakeholders and for tradeoffs to be made that expedite compliance among those who are directly impacted by the reforms. Second, negotiated rulemaking is a *process of empowerment*. It encourages the participation and enfranchisement of parties that have a stake in reform. It provides voice to interests, concerns and priorities that otherwise might not be heard or considered in devising new policy. Third, it is a process that promotes *creative but pragmatic solutions*. By encouraging a holistic examination of the policy area, negotiated rulemaking asks the participants to assess the multiple issues and subissues involved, set priorities among them, and make compromises. Such rethinking often yields novel and unorthodox answers. Fourth, negotiated rulemaking offers an *efficient mechanism for policy*

*implementation.* Experience shows that it results in earlier implementation; higher compliance rates; reduced time, money and effort spent on enforcement; increased cooperation between the regulator and regulated parties; and reduced litigation over the regulations. Regulatory negotiations can yield both better solutions and more efficient compliance.

There are some negative aspects to the use of negotiated rulemaking as well. First, it is a *resource intensive process* over the short term. More time and money must be spent to organize, find facilitators, involve stakeholders, and conduct meetings and negotiations than in the traditional top-down approach. Second, the process might produce *greater contentiousness* than the top-down approach, again in the short run, because more perspectives are brought to bear on the problem. Stakeholders are encouraged to promote their interests in the negotiations and this can lead to increased conflicts of interest and possible delay. Third, negotiated rulemaking commits the regulatory agency to incorporate the findings of the Advisory Committee in a serious way. If the regulatory body contradicts the Committee's conclusions, it could be seen as acting in bad faith and might generate future adversarial relations.

## Conclusions

Negotiated rulemaking encourages participative decision making. It provides a detailed structure and set of procedures for promoting participation in

formulating policy and formulating how policy can best be implemented by encouraging the stakeholders themselves to create the implementation approach. It provides a way of building public support for policy outcomes by involving those who will be regulated in the process of making the regulations. In its search for consensus among the stakeholders, negotiated rulemaking highlights and, hopefully, pre-empts conflicts among them which, in and of itself, will help to streamline the implementation of policy reforms. Unlike most negotiation and mediation approaches that are initiated by conflicts over a controversial policy reform or implementation, negotiated rulemaking targets elimination of disputes among stakeholders *before* they become manifest. It is a preventive technique.

Negotiated rulemaking has matured beyond the experimentation phase – it has been used, tested and proven to be effective in many diverse, complex and contentious situations. Applied rigorously, negotiated rulemaking can empower stakeholder groups, yield better policy reforms and implementation approaches, improve compliance with reforms, and generate more cooperative relationships between government and civil society. It also represents an important link between democratic governance and economic growth interests. While stimulating direct public involvement in policy making, it also can enhance the business and investment climate and reduce government's enforcement costs as well.

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