

Lecture 4

Cooperative Negotiators

 by Roger Batchelor

Understanding the strategic frameworks and legal tools that transform adversarial disputes into collaborative problem-solving opportunities



Essential Legal Terminology

Enjoin & Injunction

Courts possess the authority to order parties to act, or to refrain from acting, in specific ways. When a court needs to prevent a party from undertaking certain actions, it issues an **injunction**—the actual writ or formal order directing compliance. This equitable remedy serves as a powerful tool in negotiation contexts, as the threat or reality of an injunction fundamentally alters the bargaining landscape between parties.

BATNA

This critical acronym stands for "**Best Alternative to a Negotiated Agreement.**" A party's BATNA represents the most favorable outcome that party could reasonably expect if negotiations fail entirely or are never initiated. Understanding your BATNA—and accurately assessing your opponent's—forms the foundation of effective negotiation strategy, establishing the baseline against which all proposed settlements must be measured.

The Cooperative Negotiation Paradigm

Much of the negotiation occurring between parties involves individuals who view themselves as **problem solvers rather than adversaries**. In these situations, both parties hope that when negotiations conclude, everyone departs with more value than when they began—a fundamentally different mindset than traditional adversarial bargaining.

However, not all negotiation unfolds in such a collegial atmosphere. There exists one essential prerequisite for cooperative negotiation: **both parties must recognize they're dealing with a non-zero-sum situation**. In distributive bargaining scenarios, one party can gain only at the direct expense of the other, making genuine cooperation impossible and forcing parties into competitive negotiation strategies.



The Widget Waterer Dispute: Part 1

Initial Partnership

Asher, an inventor, creates the "Widget Waterer"—a device for watering widgets. Benjamin, a manufacturer with a vacant machine shop in Opelika, reads about the invention and approaches Asher. They enter a 50-year royalty agreement granting Benjamin exclusive production rights in exchange for substantial yearly royalties plus a percentage of profits.

1

2

3

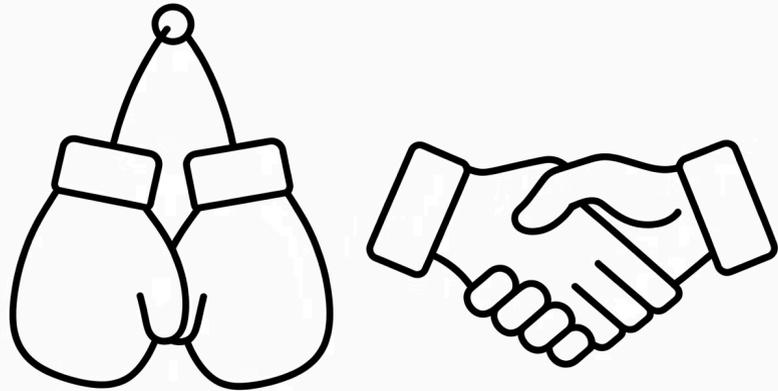
Legal Action

Finally, Asher files suit seeking release from the original agreement and an injunction preventing Benjamin from producing additional Widget Waterers. The dispute transitions from business conflict to formal legal proceedings.

Relationship Deteriorates

Two years into the venture, serious problems emerge. Asher believes Benjamin is cutting corners and producing an unsafe product to maximize profits. Benjamin resents Asher's constant interference in production processes about which he lacks expertise. For a full year, the two fight and argue continuously.

Adversaries Don't Always Mean Adversarial Negotiation



At first glance, Asher and Benjamin appear to be typical adversaries. They harbor mutual dislike and have established a history of bad blood through a year of fighting. This emotional backdrop might suggest that any subsequent negotiation would necessarily adopt an adversarial, competitive stance.

However, this conclusion would be premature and potentially costly. A legal team that remains emotionally detached from the situation can often identify opportunities for **problem-solving collaboration** in precisely these types of conflicts. The key lies in distinguishing between the parties' emotional state and the underlying structure of their dispute.

TURNING POINT

The Widget Waterer Dispute: Part 2

Asher's attorney takes the first strategic step by seeking a **temporary injunction** preventing Benjamin from further production. Once the court grants this injunction, both parties immediately begin hemorrhaging money until the dispute resolves. Asher stops earning royalties on his invention. Benjamin generates no revenue from a fully-equipped, idle plant. Crucially, **both parties are leaving money on the table.**



Litigation Path

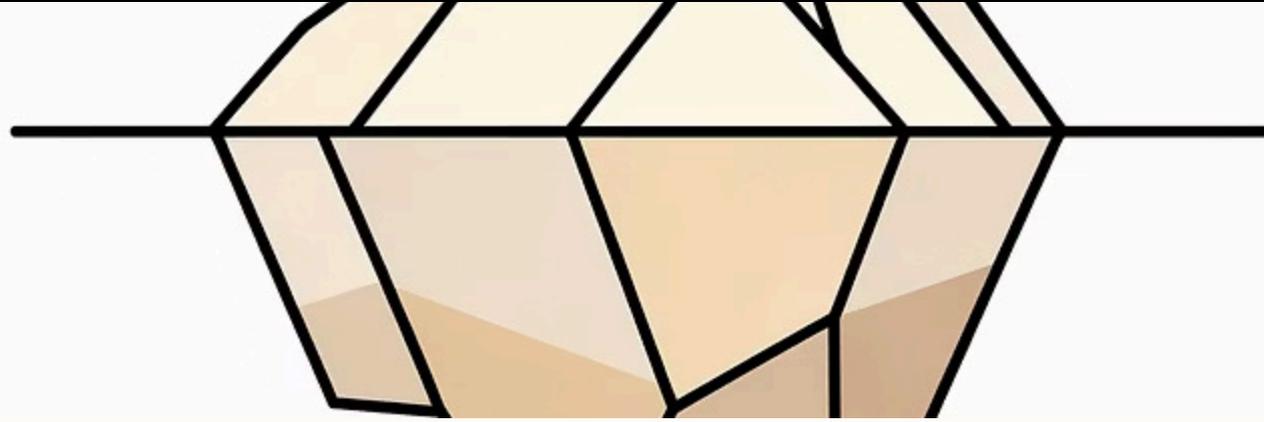
Long, expensive court battle with uncertain outcome and guaranteed losses during proceedings



Negotiation Path

Potential for mutual gain without proportionate loss to the other party

By negotiating a settlement rather than pursuing protracted litigation, each party could achieve meaningful gains without those gains coming from directly proportionate losses to the other. For instance, Asher might permit Benjamin to produce Widget Waterers for five more years, in exchange for Benjamin releasing Asher from the original 50-year agreement. This outcome benefits both parties compared to their litigation alternatives.



Demands vs. Needs: A Critical Distinction

Legal scholar Dauer identifies one pivotal difference between competitive and cooperative negotiating approaches. In **competitive negotiation**, an attorney must identify her client's *demands*—the specific outcomes the client insists upon obtaining.

In **cooperative negotiation**, the initial task fundamentally differs: the attorney must identify the client's underlying *needs*—the core interests and concerns driving those surface-level demands.

This distinction, while appearing subtle, profoundly impacts negotiation strategy and outcomes. Dauer and other negotiation theorists agree that cooperative negotiation both requires and produces a far more complex landscape of discussion than competitive negotiation contexts, demanding deeper analysis and more creative problem-solving.

CORE PRINCIPLE

Beyond Zero-Sum Thinking

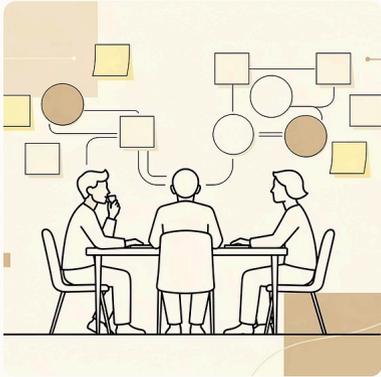
"Negotiation is not just a 'game' to be won. The problem-solving approach usually functions in an integrative (multiple issue) rather than a distributive (single issue) context."

— Nutshell at 24

Dauer significantly elaborates on this foundational concept: If negotiation remains positional or one-dimensional, the contest focuses narrowly on a single variable—typically the dollar amount a defendant will pay a plaintiff, as in competitive bargaining situations.

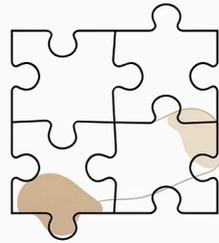
Collaborative bargaining, by contrast, seeks to identify many diverse interests and explore mechanisms for trading these interests without adopting win-lose limitations. Rather than fighting over a fixed pie, parties work to expand the pie itself, creating value that wouldn't exist through adversarial approaches.

The Creative Negotiator's Toolkit



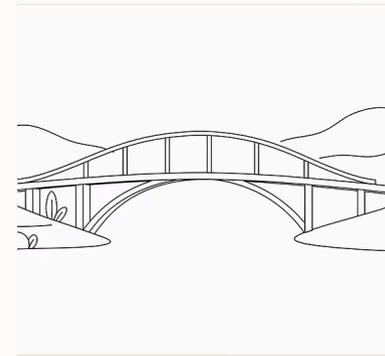
Value Creators

A simple, linear approach suits competitive bargaining but generally fails in cooperative contexts. Success demands creativity in generating what negotiation theorists call "value creators"—novel solutions that address multiple interests simultaneously.



Integrative Thinking

Rather than viewing issues in isolation, effective cooperative negotiators identify connections between seemingly disparate concerns, finding trades that benefit all parties without requiring proportional sacrifices.



Interest-Based Solutions

By moving beyond positions to understand underlying interests, negotiators discover solutions that satisfy core needs even when surface-level demands appear incompatible.

From Adversaries to Problem-Solvers

Any dispute begins with parties who function as adversaries in some capacity—that's the nature of conflict. The hallmark of an effective cooperative negotiator lies not in eliminating this adversarial dynamic entirely, but in **preventing adversaries from defaulting to classic adversarial, competitive, distributive negotiation tactics.**

Instead, skilled negotiators guide parties toward what legal scholars describe as "the predominant model advanced in negotiation theory today": **problem-solving, cooperative, integrative bargaining.** This approach doesn't deny the existence of conflicting interests; rather, it reframes how parties pursue their interests within the negotiation context.

Key Transformation

Convert adversarial positioning into collaborative problem-solving while maintaining zealous advocacy for your client's core interests

Understanding Asher's BATNA

Let's return to the Widget Waterers hypothetical and help Asher make informed decisions regarding negotiation strategy. Based on the court docket, several facts become clear:

Timing

Asher's case won't be heard for at least six months. During this period, numerous preliminary motions (including challenges to the already-issued temporary injunction) and extensive discovery will occur—all expensive and time-consuming.

Best Case Scenario

A favorable decision arrives in nine to twelve months, freeing Asher to approach another manufacturer with his Widget Waterer design. However, he must then invest additional time negotiating a new production agreement before royalties resume.

Financial Reality

Asher faces substantial lost income over the next year or more, with mounting legal expenses and zero royalty payments throughout the litigation period.

We haven't painted an appealing picture for Asher's earnings prospects. **This bleak BATNA is precisely why negotiation becomes an attractive alternative.** Unless negotiations proceed disastrously, Asher likely benefits from the process compared to litigation.

Evaluating Benjamin's Position

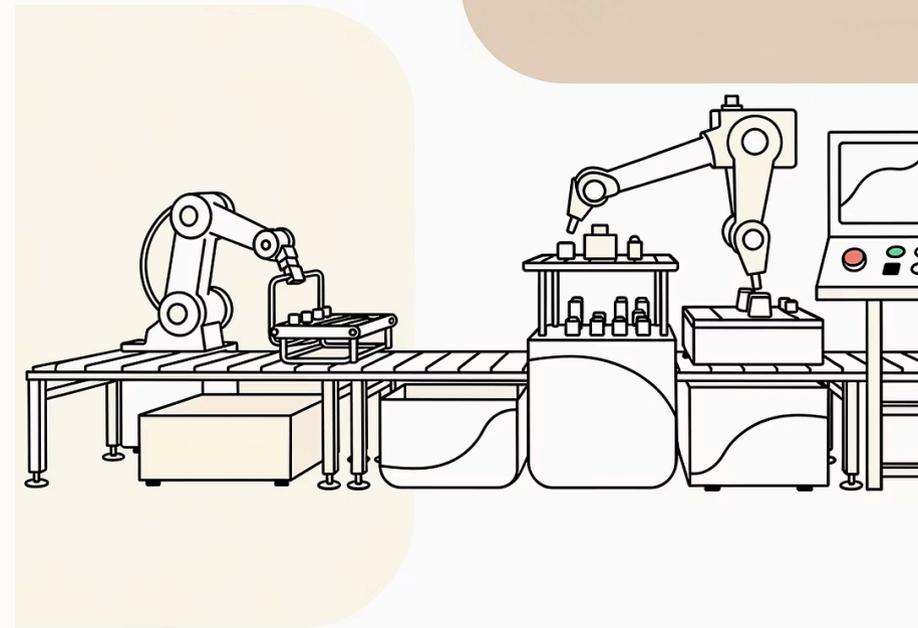
Benjamin's Best Case

After enduring lengthy and expensive litigation, Benjamin retains the right to continue producing Widget Waterers. Assuming he believes the product will remain profitable for years to come, he possesses well over 40 years remaining in the original 50-year agreement.

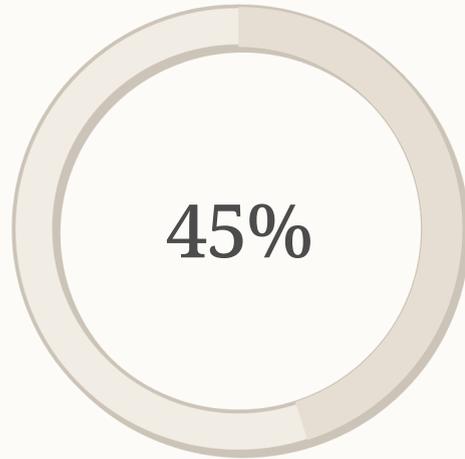
The cumulative profits potentially earned over those four decades suggest Benjamin might demand a substantial settlement payment to relinquish his contractual rights voluntarily.

The BATNA Calculation

In cooperative bargaining, each party's BATNA dictates what that party will reasonably accept as an alternative to proceeding with trial. The settlement range exists in the space between these two BATNAs—where both parties prefer the negotiated outcome to their litigation alternative.



The Uncertainty Factor



Known Variables

Current costs, existing contract terms, immediate financial impacts



Unknown Variables

Future market conditions, alternative opportunities, litigation outcomes

BATNAs themselves rarely submit to easy calculation. Critical questions remain unanswered: Will Asher locate another manufacturer for his product? Will Widget Waterers maintain profitability for decades as Benjamin assumes? Unknowns, hypotheses, and risks perpetually influence the process.

If each side could accurately calculate both their own BATNA and their opponent's, negotiation would conclude swiftly with mathematical precision.

The uncertainty itself creates the negotiation space—the range of possible outcomes that both parties might accept, depending on their risk tolerance and assessment of probabilities.

The Reality of Cooperative Bargaining

Common Misconception

Cooperative bargaining means each party seeks the best outcome for their opponent

Actual Reality

Each party pursues their own optimal outcome, but frames it to help opponents perceive benefits

We must not deceive ourselves into thinking cooperative bargaining involves two parties altruistically seeking the best outcome for each other. **Quite the opposite is true.** Each party still pursues their own optimal outcome with full vigor.

The distinguishing feature lies in how the game is played: parties attempt to help their opponents perceive genuine benefits in proposed outcomes. This doesn't require deception—merely creative problem-solving that identifies mutual gains and frames solutions in terms that resonate with the other party's interests and needs.

PRACTICAL EXAMPLE

The Car Sales Negotiation

A 1997 publication by the National Institute for Trial Advocacy provides an excellent real-world example in "A Practical Guide to Negotiation." The everyday car-buying experience demonstrates problem-solving as a negotiation strategy.

01

Buyer's Initial Frame

Customer enters with a fixed purchase price in mind—a single-variable, competitive approach

02

Salesman's Reframe

Salesman steers discussion toward monthly payments, introducing multiple variables and time horizons

03

Mutual "Win" Perception

Salesman achieves a purchase price above the customer's initial target; customer perceives victory through acceptable monthly payments

This example doesn't suggest the salesman cheats the buyer. Rather, it illustrates how the optimal outcome for the salesman (a higher total price) gets repackaged as something the buyer perceives as advantageous (manageable monthly payments). Both parties believe they've won—and both may have, depending on their respective priorities and constraints.

The Strategic Core of Cooperative Bargaining

So long as the salesman thinks he "won," and manages to make the buyer believe the same about himself, the salesman is not usually actually concerned with the benefits received by the buyer as a result of this bargain.

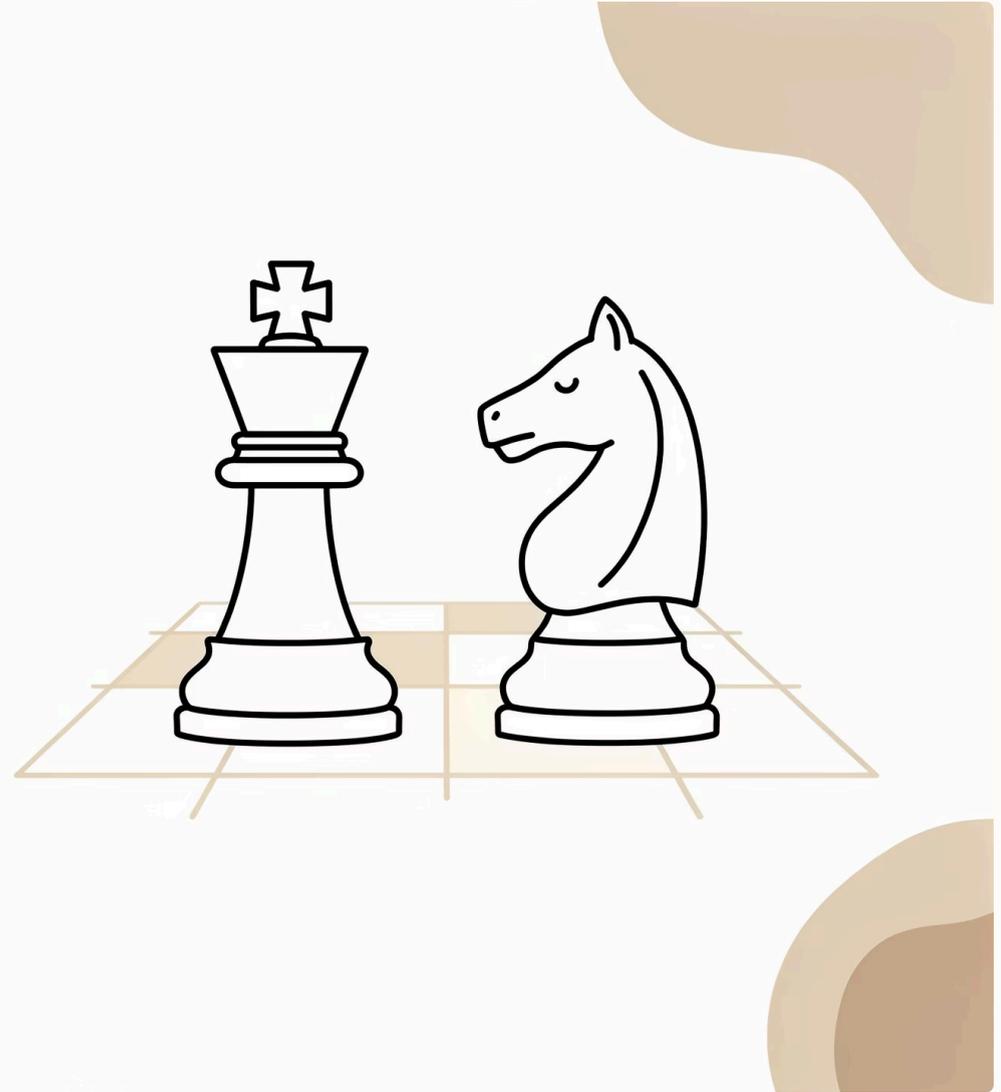
This statement captures the essential strategic truth of cooperative negotiation. The process may differ from competitive bargaining in tone and tactics. Parties' positioning may appear less aggressive and more collegial. **However, one must never forget that in negotiation of any kind, the ultimate goal remains obtaining for your client what your client seeks.**

Cooperative bargaining simply provides another pathway—often more efficient and value-creating—to accomplish that fundamental objective. The collaborative atmosphere serves as means, not end.

The Prisoner's Dilemma

Albert W. Tucker (1905–1995), former Chair of Princeton's Mathematics Department, popularized "the prisoner's dilemma" as a classic example of non-zero-sum situations. This "game" frequently illustrates concepts in economics, mathematics, philosophy (particularly decision theory), and negotiation strategy.

The central challenge: No matter how thoroughly one prepares, in negotiation situations one never knows with certainty how opponents will act. This fundamental uncertainty shapes all strategic decision-making.



The Classic Prisoner's Dilemma Scenario

You and your friend Xeno are arrested and charged with a crime. The authorities separate you and offer each the same deal, creating the following payoff structure:

Both Stay Silent

Each receives 2 years in jail
(partial responsibility
acknowledged)

Both Confess

Each receives 4 years in jail (full
responsibility, no cooperation
credit)

One Confesses, One Silent

Confessor goes free; silent party
receives 8 years (implicated by
partner)

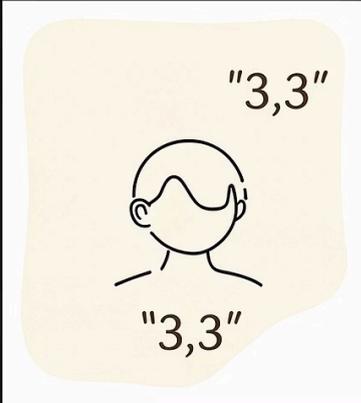
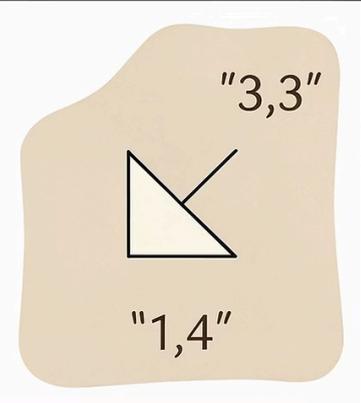
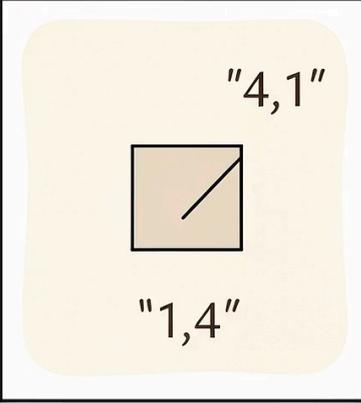
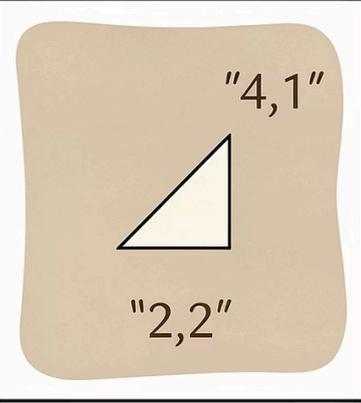
The dilemma arises because individual rational action (confessing to avoid the 8-year risk) leads to suboptimal collective outcomes (both getting 4 years rather than 2). If both parties could trust each other to remain silent, they'd both achieve better results than pursuing individually "safe" strategies.

Prisoner's Dilemma Payoff Matrix

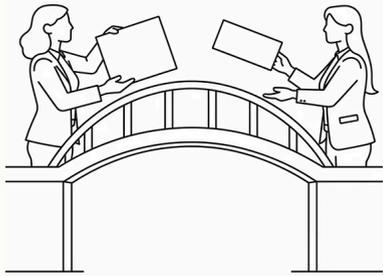
The traditional representation visualizes all possible outcomes simultaneously, helping analyze strategic choices:

Many formulations present this as a **multiple-round game**, where each person decides to speak or stay silent, penalties accrue, and then each decides anew. Cumulative penalties accumulate across rounds until the game concludes.

This iterative structure more closely mirrors real negotiation dynamics, where parties make sequential decisions, observe outcomes, adjust strategies, and must consider both immediate results and long-term relationship effects.

	"Cooperate"	"Defect"
Cooperate	 <p>"3,3"</p> <p>"3,3"</p>	 <p>"3,3"</p> <p>"1,4"</p>
Cooperate	 <p>"4,1"</p> <p>"1,4"</p>	 <p>"4,1"</p> <p>"2,2"</p>

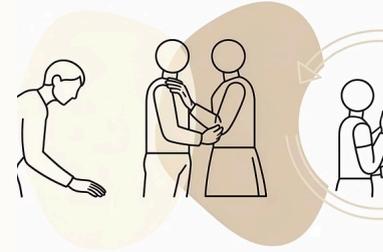
Applying the Prisoner's Dilemma to Negotiation



Trust and Cooperation

The dilemma demonstrates why establishing trust becomes crucial in cooperative negotiation.

Without credible commitment mechanisms, parties default to competitive strategies even when cooperation would benefit everyone.



Repeated Interactions

When parties expect ongoing relationships, cooperation becomes more rational. The shadow of the future encourages present cooperation, as today's betrayal damages tomorrow's opportunities.

Understanding these game theory principles helps negotiators recognize when cooperative strategies make strategic sense—not merely as idealistic approaches, but as rational responses to the structure of the negotiation itself.

Cooperative bargaining succeeds not by ignoring self-interest, but by aligning self-interest with collaborative problem-solving.