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December 2007

Working Paper 07-15

KDI 국제정책대학원
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Research Seminar
July 27, 2007

Abstract

The challenge of getting disputants committed to the public dispute resolution process is the major obstacle to the use of consensus building methods. Without the commitments of parties to come to the table, there is no possibility of consensus building.

There has been a tendency to criticize parties of not being rational enough to come to negotiating tables in public disputes in South Korea. Compared with disputants in Western democracies who seem to be better at negotiating among them, Koreans have been not that sophisticated in their dealing with public disputes.

While the reality of involving parties in the process is very frequently more complex than a few simple hypothesis about the incentive to come to the negotiating table, their incentive is highly associated with their calculation of BATNA (Best Alternative to a Negotiated Agreement). I hypothesize that the calculation of BATNA is also influenced by institutions, such as legal frameworks, surrounding parties in specific public disputes.

This hypothesis-generating research can be the first step to better understand disputants, and distinct contexts in Korean public disputes so that it may suggest institutional reforms for more effective use of consensus building procedures in Korea.

Keywords: BATNA, Public Dispute Resolution, Negotiation, Institutions, South Korea

Introduction

Let's begin by sitting in a classroom for a graduate-level semester course on negotiation and public dispute resolution in Korea. The lecturer who was educated in US is just about to introduce the so-called Harvard concept for successful negotiation as a useful tool to resolve public disputes to Korean students. Soon, the students come to know that the new concept of negotiation is being called with various names, such as interest-based negotiation, integrative negotiation, principled negotiation, win-win negotiation, or mutual gains approach (Fisher and Ury, 1981; Lax and Sebenius, 1986; Susskind and Field, 1996). The punch line of the class is that public disputes can be resolved more effectively, if the parties voluntarily negotiate an agreement that serves their interests. Then, the lecturer spends a few hours in explaining why other conventional approaches to address public disputes, such as demonstrating, lobbying, and litigation are inferior options to a negotiated approach.

Suddenly, a student raises his hand to ask a question, "*what if a disputant does not want to negotiate and rather resort to demonstration?*" The lecturer thinks that it is a perfect time to come up with the concept of BATNA (Best Alternative To a Negotiated Agreement) to students and elaborate why the concept of BATNA is critical in the mutual gains approach to negotiation. The lecturer emphasizes several times that they should know their BATNA and go further to figure out other parties' BATNAs and asserts that the smart negotiator considers not only what he or she wants (or fears) most, but also what is most likely happen. This is the first and foremost important concept that is delivered to the students from the beginning of the course. There is no better advice to groups involved in public disputes than "Know your BATNA and don't lose sight of it."

(Susskind and Cruikshank, 1987)

Now, theoretically if they know their own BATNA and others, they will be able to decide whether they should come to a negotiating table and/or when they should walk out from the table. In other words, a student mastering this course is expected to make a decision to negotiate when his or her BATNA is not as good as a possible agreement from the negotiation and to walk out from the negotiating table when proposed agreement from negotiation is below his or her BATNA. Negotiation scholars support this theory that parties will engage in negotiation where there is a possibility of diminishing transaction costs, such as time and legal expenditures (Raiffa, 1982; Goldman, 1991), while they often try to be part of negotiation in order to delay the process intentionally (Kim, 2007).

However, to understand the concept of BATNA is one thing and to calculate and analyze their BATNA in reality is another thing. The importance of knowing BATNA is evident given that few groups involved in public disputes do nearly enough analysis before selecting a negotiation strategy. That's what negotiation classes are for. But, BATNA calculations are tricky. Disputants should consider what is most likely happen with many different options that they could rely on. Disputants should figure out how their interests could be satisfied by resorting to conventional means, such as lobbying legislative body and administrative agency, filing a lawsuit, and having mass rallies.

Now, well into the classroom, another Korean student asks an interesting question, "*how in US people estimate their BATNAs?*" The lecturer replies to that question by referring

to one suggestion for BATNA estimation in a famous American literature. That is to calculate the expected value of each possible strategy and outcome (Susskind and Cruikshank, 1987). Such calculations involve multiplying the probability of “winning it all” or “losing at all,” times the value of the best or worst outcome. For example, if you as a member of environmental activist groups try to block a government project by filing a lawsuit against government, you should figure out what the overall savings would be if the project were blocked as you wished, as well as the overall loss if the court decision went against them and then multiply this by the likelihood of winning or losing in court.

That’s the case in US. The expected value of a court settlement may well serve as a group’s BATNA, and their awareness of that BATNA will help them establish a threshold against which to gauge possible negotiated settlements (Susskind and Cruikshank, 1987). If a cultural anthropologist commented on the US style of settling disputes, s/he would say like this, “My impression is that the United States displays a relatively high preference for clear rules spelled out in advance, is accustomed to settle differences through litigation” (Stone, 1993). It is a very practical way to calculate BATNA in public dispute settings in US. While calculations of BATNA are also difficult when all considerations cannot be reduced to dollar values, the time, money, and political capital required in court battles are more likely and practically to be used for estimating BATNAs.

Litigation-related costs in dispute settlements in US influenced BATNA estimation critically and helped disputants including government officials and non-governmental

groups to consider alternative ways to resolve disputes. For example, in 1976, Harvard Law Professor Frank Sander (1976) came up with a vision of “Varieties of Dispute Processing,” which is often credited as “the Big Bang” of modern dispute resolution theory and practice in US. In his vision of a courthouse, not all cases would proceed through the doorway (literal and figurative) leading to litigation. Instead, the “multi-door” courthouse would direct cases to proceed through a variety of other processes, including mediation, arbitration, conciliation, fact finding, or ombuds services, depending on the nature of the case. Sander’s vision could attract attention from a group of Judges who believed there were too many cases in the courts and who sought diversionary processes and institutions to reduce court dockets and achieve greater judicial efficiency. For members of this group, the “quantitative” or “efficiency” aspects of dispute processing were most significant (Menkel-Meadow, 2005).

Another example of dissatisfaction with the typical adversarial legal battles in public disputes in US is shown well in U.S. environmental regulation throughout the 1980s-90s (Ruckelshaus, 1998). The Environmental Protection Agency (EPA) had been regularly sued by interest groups over its regulation-by-rulemaking activities, over allegations that the EPA’s regulations were too lenient, too strict, or otherwise violate federal law. Not surprisingly, in the mid 1980s, it was estimated that 80 percent of all major environmental rules issued by the EPA were litigated in lengthy court battles that are the stuff of legend in environmental politics (Ruckelshaus, 1995). Dissatisfaction stimulates learning (Rose, 1993). At the heart of governmental and social learning in the regulatory process was negotiated rule making.

This kind of dissatisfaction with increasing rate of law suits and associated costs was reinforced by many well-intentioned efforts of US government to enhance the legitimacy of US governmental process by making the government system more accountable. The courts have broadened the number and range of parties eligible to challenge proposed rules. As a result, those liberal rules have empowered non-governmental litigants to step in and either sue or force the government's hand.

Now get back again into the classroom, how could we answer the next question from another Korean student, "***then how Koreans can or should estimate theirs BATNAs practically enough to be utilized in public dispute resolution?***" Well, the answer should be based on the understanding of Korean contexts, such as culture of setting disputes, institution settings, political processes, and so forth. In a comparatively sense, first of all, Korean people are less accustomed to settle disputes, especially complex public disputes through litigation than American people. Culturally, Korean people belong to collectivism culture (usually in Asian countries) rather than individualistic culture (in Western democracies). Other contextual factors affecting BATNA calculation may be tied to elevated expectations concerning increased participation, procedural justice, and greater transparency (Holzinger, 2001).

While Alternatives Dispute Resolution (ADR) such as mediation, negotiation, facilitation, or other participatory mechanisms seem to have been very successful in the US and in Canada (Bingham, 1986; Goldberg, Sander, and Rogers, 1992), so far they have not been widely used in Europe (Weidner, 1998). Nowadays, many countries in Eastern democracies including Korea are open to alternative ways of handing public

disputes such as interest-based negotiation which have been experimented in the several Western democracies in order to find a way out of public disputes, characterized by violent confrontation. While in such countries societal dissatisfaction with conventional means to resolve public disputes gives some incentive for people to try alternative mechanisms, it is apparently in different context from those of US. If Korean people are to enhance the use of interest-based negotiation, they need to be more confident in their BATNA calculation. But, in Korea, there exists no condition or context such as increasing costs associated with adversarial legal battles in US by which can make BATNA calculation more practical and easier.

Thus, at this stage, it is an impending task to understand what external and institutional factors in a society exist and affect the incentive for disputants to come to negotiating tables, and hence BATNA calculation. In this paper, I try to analyze BATNA calculation in a typical public dispute in Korea as a neutral professional aimed at facilitating the use of BATNA estimation in Korea Public Dispute.

Public disputes on high voltage transmission tower construction in Korea

Since the early 1960s South Korea has achieved an incredible record of growth and integration into the high-tech, modern world economy. Such a rapid industrialization in Korea has accompanied drastic changes in spatial distribution of human settlements. The urban population in Korea, which accounted for only 28 percent of the total population in 1960, doubled to 57.3 percent in 1980, and further increased to 74.4 percent in 1990, primarily due to rural-to-urban migration. Consequently, growth of metro cities requires stable provision of electricity for people, industries, facilities, and

other financial activities. In order to respond to the huge demand of electricity from large urban areas, Korean government takes it for grated to establish enough power generation plants and its broad network which can penetrate into the needed areas. The problem is while most power generation facilities as sources of electricity are located in eastern inland or seaboard of the Korean peninsular, the major metropolitan cities which need electricity the most are located in western part of Korea. This discrepancy between sources and loads necessitates the construction of many high-voltage electricity transmission towers across Korea from eastern seaboard to western inland.

Ironically, the provision of electricity as public goods for metropolitan cities is creating lots of commotions and public disputes. This type of public dispute is simply categorized as siting dispute. Stakeholding groups are easily identifiable. The dispute seems to be zero-sum game about whether to build or not to build. However, the disputes have potential for integrative solutions in that their issues include distributional factors, such as distance of lines and towers from buildings, length of buried lines under ground (in case), and costs of burying the lines. In some cases, the resistance is rooted in deep-value difference when residents have enshrined a proposed site as spiritual places or religiously important area.

Basically, rural residents as well as urban dwellers near the proposed site of high-voltage transmission towers do not want to have the towers in their backyard due to its potential health threats. They are also concerned about decrease of their property values and many other negative things associated large infrastructures. But the position of government, especially, the Korea Electric Power Corporation (KEPC) is that these

towers should be constructed at proposed sites in order to provide stable electricity efficiently and effectively for the increasing demand of electricity in the large city dwellers located in the western part of the country.

Taking into consideration of the recent number of public disputes associated with power transmission tower in Korea, the situation is alarming. According to the statistics revealed in 1999 inspection of the administration by the National Assembly, complain files from the pubic submitted to the KEPC amounted to 1,120 cases during 1995-1999. Nowadays, there are so many plans to construct high-voltage transmission towers across the country. For example, only in Kangwon District which has many power generation plants and facilities, there are currently 103 projects related to transmission towers going on in June 2007 and another 253 projects are scheduled soon.

Characteristics of public dispute resolution around high-voltage transmission tower in Korea

As a preliminary step toward full-fledged research, I delved into major thirty cases of transmission tower-related public disputes which appeared in news media between 1994 and 2007. My observation found coherent patterns of public dispute resolution in the thirty cases. In general, construction projects in those thirty cases were delayed for 2 – 10 years due to fierce resistance from residents. After such delay, disputants seemed to resolve the disputes through kinds of voluntary or mediated negotiations at the end. In other words, after consuming all conventional means to resolve their disputes, they tend to finally resort to face-to-face negotiation.

The typical patterns of interaction among disputants are as follows: Right after there is a rumor about proposed high-voltage transmission tower or official announcement from the KEPC about construction projects, residents near the proposed site establish an ad-hoc (blocking) coalition group, sometimes allied with local non-governmental groups very quickly (Figure 1).

Figure 1. Ad-hoc coalition group creation against a tower project

And they start to show off their collective power by having public rallies in front of public buildings and having media conferences (Figure 2).

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Figure 2. various types of public rallies

Sensing the pressure from protests, the KEPC conducts several public hearings, mandated by a procedural act. However, usually residents and the KEPCO cannot narrow their differences and they dig into their positions whether to build or not to build the tower on the proposed spot.

Without any progress in public hearings and constructive communication or dialogue among disputants, the KEPC preempt with unilateral action to start construction process on the spot and the residents become angrier to the extent that they block construction by occupying the site with often physical collision between residents and construction workers (Figure 3.)

Figure 3. Occupation of the proposed site by angry residents

If the situation escalates to this stage, residents and local governments often resort to administrative litigations against each other. Sometimes, civil suits are filed for physical damages among construction companies and residents. And sometimes, but in very few

case, disputants voluntarily negotiate and make an agreement to resolve their disputes (Figure 4).

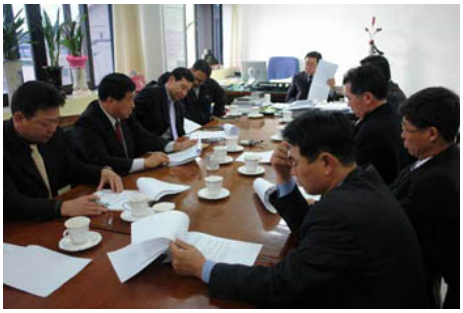

Figure 4. Voluntary negotiation among disputants

Conflict Assessment and Mapping of interests

Based on preliminary analysis of thirty cases, I try to map interests among major disputant groups around high-voltage transmission tower disputes (Table 1).

Table 1. Interests and positions among stakeholders

Stakeholder	**Residents**	**NGOs**	**Local government**	**Central government**	**KEPC**
Interests	Credibility of siting decision (objectivity of scientific analysis on the site)	Safety of the residents Environmental protection Strengthenin	Serve local residents' interests Avoid LULUs in its	Providing cheaper and stable electricity to the public and enhancing competitivene	Providing stable electricity Optimal network of electric

	Appropriate Compensation for negative impact on property values and so on. Participation on siting decision making Public health concerns due to electro-magnetic field associated with high-voltage transmission	g of their own organizations	jurisdiction Fairness in siting decision (no more LULUs) Economic development in its jurisdiction Securing financial resources	ss of industry Efficient implementation of national projects	power grid Maintaining the benefited-pay-principle and requester-pay-principle Optimal distribution of limited resources

General Comments on protracted public disputes in such cases

For delayed and adversarial confrontation among residents and government in Korea, there are several kinds of criticism. The first criticism is conjectured on disputant themselves. For example, some commentators ascribe failure of dispute resolution to the lack of civility among disputants. Typical pessimistic arguments include that Korean people are not good at negotiation, they are not accustomed to participatory decision makings, and they are not rational enough to have constructive dialogue. This kind of criticism lead to another pessimistic conclusion that alternative dispute resolution processes are not likely to work at this time in Korea and it will take quite a time to have situation ripe for alternative dispute resolution.

Another group of commentators blame existing but perfunctory and inadequate administrative procedures aimed at consulting stakeholders in decision making processes for the failure of dispute resolution. They maintain that residents could not participate in decision making processes meaningfully due to one-way communication in public hearings and other meetings with government officials.

These two groups of commentators are not good at answering more fundamental questions, such as “why Korean disputant in this siting controversy usually consume all kinds of conventional means and why they do not initiate negotiation much earlier than the situation gets much worse?” To answer this question, I assume that Korean people are rational rather than irrational so that their strategic behaviors are based on their own reality check, whether their check is right or wrong. The second assumption is that their

initiation of voluntary negotiation as alternative way to deal with disputes hinges on BATNA estimation. With these two assumptions, I propose one framework to better understand Korean BATNA calculation, which include institutional context as another background factor to influence disputants' strategy (Figure 5.)

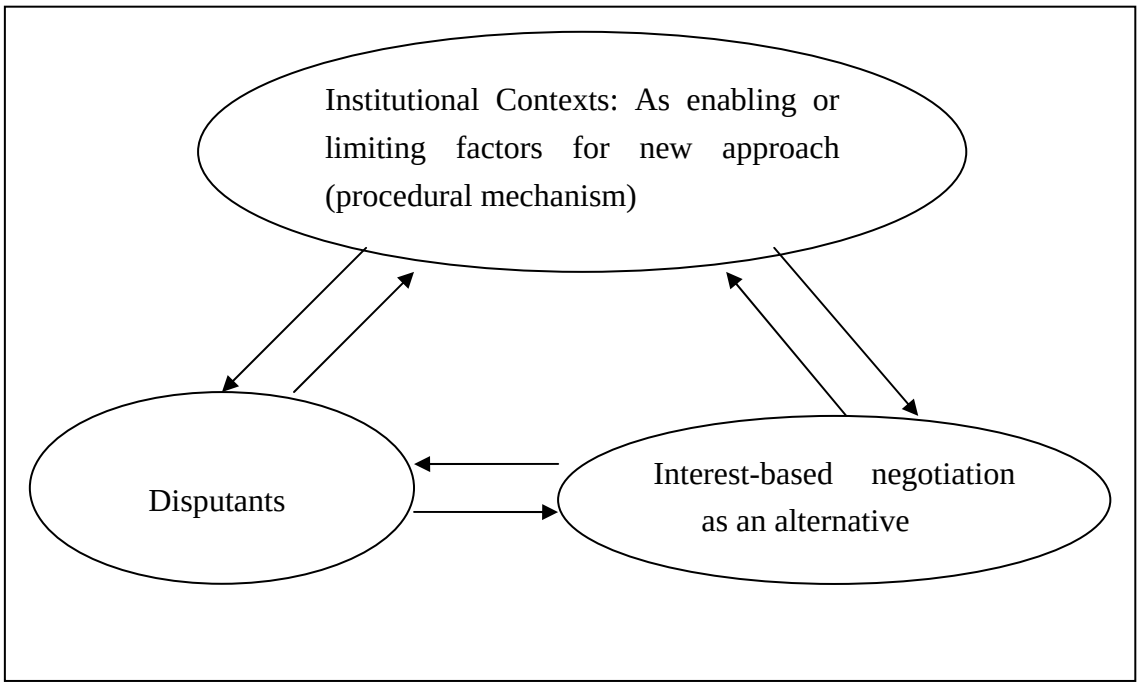

Figure 5. Comprehensive framework to understand BATNA calculation

With this comprehensive framework to understand the working of specific alternative dispute resolution mechanism, such as interest-based negotiation, I intend to answer many other practical (sometimes academic) questions regarding Korean cases, such as:

- From the perspective of disputants: *how is it certain that Korean disputants are really not good at negotiation and they prefer conventional and adversarial means to constructive communication and negotiations? Are their idiosyncratic behaviors path dependent on Korean culture and history*?

- From the perspective of procedures: *how will it be possible to induce Korean disputants to consider consensus building process through negotiation seriously and as quickly as possible in order to reduce costs due to delay and confrontation?*
- From the perspective of broad institutions: *Are there certain institutional settings in Korea which are likely to enable (facilitate) or limit the use of alternative dispute resolution approach? If there are limiting institutional structure, how could it be adjusted to fit for alternative means to resolve public disputes in Korea?*

Institutional setting as enabling factor

According to many prescriptions suggested by existing negotiation and dispute resolution theories, making positions more flexible and reaching consensus with less cost will be the result of internal process management factors. Consensus building approach emphasizes the roles of professional neutrals in assessing conflict, facilitating and managing consensus building processes through negotiation (Susskind, McKearnen, and Thomas-Larmar, 1999). The management of dynamics of a consensus building initiation by neutral professionals may operate in a delicate synergy in inducing disputants much easily into negotiation (Poitras and Bowen, 2002). The procedural management from the initiation itself, however, will meet with limitations. As has been shown by Arrow et al. (1995), barriers to successful negotiation are manifold. They can be found at the level of the individual parties, the negotiating collectives, the strategic constellation, or the social and institutional environment the conflict is embedded in. In particular for this section, there are many factors that are beyond the control of the

participants in the negotiation, for example legal provisions or regulations which allocate asymmetric power to the parties of forbid certain solutions to the conflict. The actor's willingness to compromise is not determined solely at the procedural level. However, the ADR literature concentrates for the most part on what goes on inside the procedure itself. External influencing factors are usually not given systematic attention (Holzinger, 2001).

For example, the US legal structure as an institutional setting, which allows the public and non-governmental groups to litigate governments for their plans or activities, has created the high uncertainty surrounding the outcome of unilateral action such as litigation and preemptive implementation by government. That's how disputants come to believe that negotiated outcome might be better than uncertain outcomes in courts. As one striking example of such a case, there is the 1973 Endangered Species Act (ESA) in US. The Act has a very strong teeth with Section 9, which prohibit any person or organization from "taking" fish or wildlife species listed as endangered by the US Fish and Wild Service (FWS). One consequence of 1973 ESA was that environmental activists could successfully sue a private landowner for altering the habitat of an endangered species and a local or state agency for either engaging in such activities or permitting them to occur. The other consequence was that developers and governments, sufficiently threatened by the Section 9, tried to strike a deal with environmentalists through negotiation rather than to be involved in long and uncertain court battle with environmentalists. This lingering threat of litigation, promoted by the ESA could keep applicants at the negotiation table and level the playing field by limiting the ability of applicants to dominate the negotiating process. In short, there existed the strong desire

for certainty among disputants by reducing uncertainty by warding off potential lawsuits.

Some hypothesis on Korean disputant behaviors in high-voltage transmission tower dispute

Regarding Korean disputants' interactions surrounding disputes on the construction of high-voltage transmission tower, I come up with potential hypothesis to explain their behaviors.

H1: Korean disputants showed no preference for consensus building based on negotiation, because they have never been exposed to the procedures of consensus building. They even don't know there exist some alternative ways to resolve their disputes.

H1-1: If they were exposed to new concepts, there might be more odds for them to be interested in trying alternative ways.

H2: Even if they came to know about negotiated approach, they would prefer to resort to conventional means, because they believed that they could achieve what they wanted through conventional means, such as confrontational tactics. Their BATNAs are higher than negotiated outcomes.

H2-1: They could be rational and right in their calculation given the institutional settings in Korea.

H2-2: They could be wrong in their BATNA calculation given the institutional settings in Korea.

Propositions on improving the use of alternative dispute resolution in Korea

With these hypotheses in my mind, I suggest eight propositions regarding the issue of

how to enhancing the use of alternative dispute resolution such as mutual gains approach or consensus building in Korea.

Proposition 1: Enhancing the use of alternative dispute resolution in Korean society hinges on social and governmental learning, rather than rapid change.

Proposition 2: To establish efficient and effective public dispute resolution system in a society, it is necessary to have a comprehensive framework which make it possible to understand the relationships and dynamics of three components: Disputants, Procedures, and Institution (Contexts).

Proposition 3: There should be made efforts to improve each component to upgrade the capacity of society to address public dispute more efficiently and effectively at the same time but with a strategic vision.

Proposition 4: Disputants should be exposed to the concept of alternative ways of resolving their disputes through constant education. Such an exposure could lower the threshold for disputants to come to negotiation much easier and they could be better negotiators during the processes.

Proposition 5: There might be certain institutional settings which limit the initiation function of consensus building through negotiation in Korea. Disputants' strategies hinges on this institutional settings. This institutional setting should be also adjusted so that the setting could be an enabling factor for consensus building negotiation rather

than limiting factor. However, the institutional change is not likely to happen quickly.

Proposition 6: A well-prepared experiment of an alternative dispute resolution procedure can change BATNA estimate in the long run, given a limiting institutional setting. A successful precedent from an experiment may play an exemplary case where disputants can create more values than in other conventional means.

Proposition 7: Any alternative ways associated with interest-based negotiation require BATNA estimation by disputants themselves. So, figuring out BATNAs under external institutional settings is critical for the success of the alternative measure.

Proposition 8: Just in case disputants are miscalculating their BATNAs in their strategies, there need the help of neutral professionals to estimate each disputant BATNA objectively.

Research proposal

So far, I discussed the important of BATNA calculation in initiating and maintaining consensus building approach based on negotiation. Also, I tried to show there are a dynamics which inter-relate disputants, procedures, and institutional setting. From the strategic point of view, it is appropriate for Korean people to focus on a well-prepared experiment while providing on-going education and conducting institutional reform.

The successful introduction of alternative ways of resolving disputes depends on comparing games between the advantages and disadvantages of conventional and

consensus building through voluntary negotiation. The first task in this comprehensive approach is to help Korean disputants' BATNA calculation more systematically. I propose to research in order to calculate objectively each disputant BATNA in many cases of high-voltage transmission tower disputes in Korea for the first time in this field. In so doing, I intend to show 1) what is the practical way to evaluate BATNAs in Korean institutional contexts, and 2) there might be discrepancy between objective BATNA estimation between subjective calculations by disputants. The outcome of the research will be valuable data to assess whether Korean institutional settings are appropriate for consensus building processes or not. Also the outcome may be used to persuade disputants to come to negotiation tables without wasting their energies on conventional means for so long.

There should be analysis on these variables below in order to estimate BATNAs:

- Disputant's risk-taking tendency (risk taker vs. risk averse)
- Time span between project initiation and its final implementation
- Time span until disputants finally come to a negotiating table.
- Costs due to delay for each stakeholder
- Effects (benefits) and costs of using conventional methods
    - Demonstration
    - Administrative litigation: Winning or losing probability and its costs
    - Civil suits: Winning or losing probability and its costs
- Trust and Relationship change before and after conventional or alternative methods
- Costs and benefits of voluntary negotiations in a few successful cases

Only with such data like variables above, the professional neutral can advise each disputant meaningfully in real public dispute cases. Without such knowledge, there will be a limitation in the effort to introduce the new alternative method to Korean society.

Further research

It can be also interesting research topic to compare similar public dispute cases among many countries. For example, we can ask questions like, how US, Singapore, Japan, China, and Korea deal with high-voltage transmission tower disputes? Is there any difference in their approaches? If so, why? Their BATNA estimations are different? And Why?

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