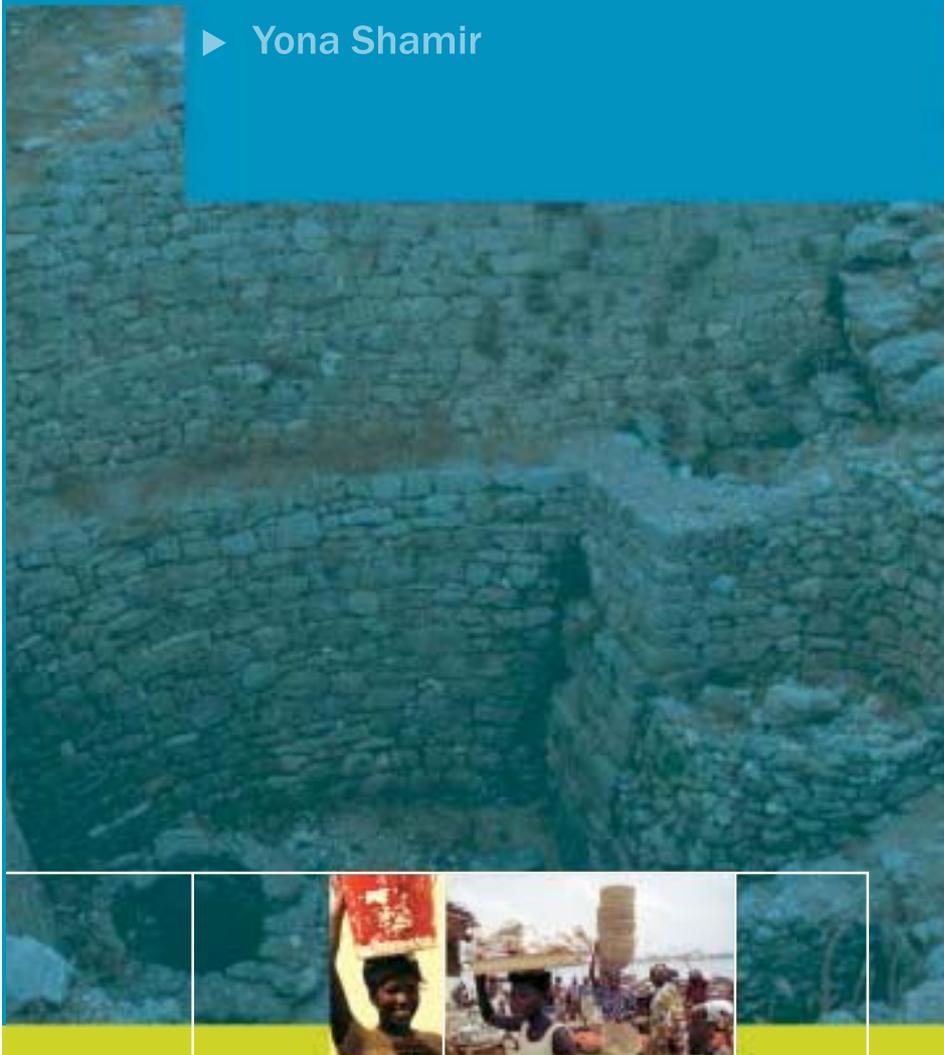


# Alternative Dispute Resolution Approaches and their Application

► Yona Shamir



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## **ALTERNATIVE DISPUTE RESOLUTION APPROACHES AND THEIR APPLICATION**

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# **ALTERNATIVE DISPUTE RESOLUTION APPROACHES AND THEIR APPLICATION**

Alternative Dispute Resolution comprises various approaches for resolving disputes in a non-confrontational way, ranging from negotiation between the two parties, a multi-party negotiation, through mediation, consensus building, to arbitration and adjudication

The article introduces the key skills required, with particular attention to their important role in the process of negotiation and mediation, with examples of their application in national and international water conflicts.

Conflict is endemic to human society, among individuals and groups, and it is important to manage it. We find stories in the Bible, in the Islamic culture, among Native Americans, First Nations in Canada, and many other traditions that describe processes that have been used from the earliest times to find peaceful solutions to various disputes, and much can be learned from the past.

In recent decades, the various conflict resolution approaches have become a widely accepted field both of academic study and of practice, with official and/or legislative functions in many countries. In international relations, they play an increasing role in containing, managing and resolving potential sources of conflict.

The article reviews its complex development. While conflict can be dangerous, it also carries the possibility of producing creative cooperation in a win-win solution. The key to this is for participants to engage as joint problem solvers, seeking to resolve the dispute, and to try and "enlarge the pie" rather than acting as adversaries and aggravating the situation.

A mediator can play a valuable role in this process, facilitate a negotiation process which has come to a dead end, helping the parties concerned to focus on their essential interests rather than defend (or attack) fixed positions. The principles and procedures of consensus building are dealt with in some detail.

The article outlines the principles of negotiation, based on interests and needs of the parties, the use of proper communication, and maintenance of a working relationship as an essential component for reaching a durable agreement.

It lists and considers the essential skills needed by negotiators and mediators, and points the different cultural expectations (national, regional, religious, or professional) and the psychological aspects that affect perceptions and communications. It outlines a range of strategies for and approaches to mediation, and the ethical problems that may arise.

# 1. INTRODUCTION AND OVERVIEW

Alternative Dispute Resolution (ADR, sometimes also called "Appropriate Dispute Resolution") is a general term, used to define a set of approaches and techniques aimed at resolving disputes in a non-confrontational way. It covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjudication at the other end, where an external party imposes a solution. Somewhere along the axis of ADR approaches between these two extremes lies "mediation," a process by which a third party aids the disputants to reach a mutually agreed solution.

This article introduces the key concepts, principles and skills of ADR in a generic form with examples of how they might be applied in the context of water conflicts. The glossary contains definitions of terms used, and readers are advised to familiarize themselves with them.

Conflicts have existed in all cultures, religions, and societies since time immemorial, as long as humans have walked the earth. In fact, they also exist in the animal kingdom. Philosophies and procedures for dealing with conflicts have been part of the human heritage, differing between cultures and societies. Nations, groups, and individuals have tried throughout history to manage conflicts in order to minimize the negative and undesirable effects that they may pose. Conflicts can develop in any situation where people interact, in every situation where two or more persons, or groups of people, perceive that their interests are opposing, and that these interests cannot be met to the satisfaction of all the parties involved.

Because conflicts are an integral part of human interaction, one must learn to manage them, to deal with them in a way that will prevent escalation and destruction, and come up with innovative and creative ideas to resolve them.

Dealing with conflicts – "conflict management," or "conflict resolution" as it has come to be called in professional circles – is as old as humanity itself. Stories of handling conflicts and the art of managing them are told at length throughout the history of every nation and ethnic group who share the same history.

Conflicts have been recorded from the very early days of humankind. We find in *The Bible* and similar religious and historical documents in different cultures an account of conflicts that were resolved by various processes, including negotiation, mediation, arbitration, and adjudication.

We also find accounts of various types of negotiations: between animals and humans, between two persons, between an individual and a group, between two groups, and between humans and God. The first negotiation in *The Bible* was between the snake and Eve, over the apple in the Garden of Eden.

But not all conflicts in religious scriptures have been resolved by alternative/appropriate dispute resolution (ADR). One that was resolved by force and violence is the story of Cain and Abel. In *The Bible* we find among many stories of conflicts and their resolution, the story of Abraham and Lot negotiating, where Abraham, in order to avoid a fight, offers Lot a deal that Lot cannot refuse.

Negotiation was conducted not only between people, but also between humans and God. Abraham negotiated with God over the fate of the people of Sodom and Gomorra. God also acted as a mediator between Abraham and Sara when she wanted Abraham to expel Hagar and her son.

In the Muslim tradition we find the story of Muhammad who negotiated with God over the number of times that the followers will pray. Muhammad managed to reduce the number from the initial fifty times a day down to five, using as his main argument the necessity to leave enough time for people to do things other than pray.

Throughout history, individuals and groups used a variety of ways to resolve their disputes, trying to reach a resolution acceptable to all parties. There is a

common belief in all cultures that it is best to resolve disputes and to reach an agreed end to them, because conflict is a destructive force.

In the twentieth century many reached the understanding that disputes are normal in human society, and not necessarily destructive, and that if they do not get out of hand they may have within them a potential for growth, maturity, and social changes, an opportunity for new ways of thinking and new experiences.

Because conflicts are an integral part of human interaction, one should learn to manage them: to deal with them in a way that prevents escalation and destruction, and arrives at new, innovative, and creative ideas to resolve them.

Much can be learned about the different ways in which conflicts have been prevented in the past. In older societies, resolving disputes was considered a unique ability reserved for the wise and the elders of the community or for religious leaders. More recently, conflict prevention has become a primary focus of interest for everyone, and this has resulted in an ever-expanding field of study and practice.

The field of conflict resolution gained momentum in the last three decades of the twentieth century. It has developed into a widely accepted field of study, where skills and strategies are being taught, and changes in philosophical attitudes occur through training and enhanced self-awareness. The increasing academic activity and practical training initiatives have generated a vast and expanding body of research and publications.

The field is characterized by diversity and complexity. It is diverse because conflicts exist in every facet of individual and social life: between business partners, employers and employees, among employees, between trading partners, among neighbors, between parents and their children, husbands and wives, an individual and society, and between countries.

The field of "conflict resolution" has matured as a multidisciplinary field involving psychology, sociology, social studies, law, business, anthropology, gender studies, political sciences, and international relations.

The discipline is complex because it deals with conflicts at different stages of their existence, and also because it is a mix of theory and practice, and of art and science, as Howard Raiffa demonstrated so brilliantly in his book *The Art and Science of Negotiation* (1982). The "science" is the systematic analysis of problem solving, and the "art" is the skills, personal abilities, and wisdom.

Some conflicts may not be resolved easily, and can last many years. Sometimes these conflicts persist in spite of the fact that they cause heavy losses of resources, and even human life. According to a study at Stanford University (Arrow et al., 1995) there are three categories of barriers to resolving conflicts:

- Tactical and strategic barriers; these stem from the parties' efforts to maximize short or long term gains.
- Psychological barriers; these stem from differences in social identity, needs, fear, interpretation, values, and perceptions of one another.
- Organizational, institutional and structural barriers; these can disrupt the transfer of information, and prevent leaders from reaching decisions that are in the interests of the parties in dispute.

A conflict may store within it the potential for a future major dispute, but at the same time it also contains the possibility of future creative cooperation, provided the parties seek what is called the "win-win solution." To accomplish this, one must learn to negotiate in a manner that is less competitive and adversarial, thereby invoking the potential for cooperation.

By working together as "joint problem solvers" seeking joint solutions and not working against one another, the participants can "enlarge the pie" that is to be

divided. This can be done either by negotiation, or with the help of an impartial third party who will act as mediator.

Third-party intervention is used when a negotiation reaches an impasse. It is used to restore belief in the possibility of a beneficial resolution for the parties, future dialogue, and restored relationships, while leaving the control over the decisions with the parties.

President Carter acted as a mediator between President Sadat of Egypt and Prime Minister Begin of Israel. Former US Senator George Mitchell acted as a mediator in Northern Ireland.

An outside third party, whether a person (Archbishop Desmond Tutu), a group of people, a representative of a state (Henry Kissinger), or an international organization (The Vatican, The UN) can act as a mediator, in an attempt to help the parties reach an understanding, and an agreed solution to the conflict.

A third party, a neutral, can also act as an arbitrator, hear the parties' arguments and reach a decision which can be binding, or non-binding according to the agreement made beforehand.

A dispute between Israel and Egypt over the location of the border between the two countries in the Gulf of the Red Sea was settled in favor of Egypt by an international arbitration panel, on September 29 1988. Israel had to return the town of Taba, a resort town near Eilat, to Egypt as a result of the arbitration.

Adjudication is another method that can be used as an alternative in the international arena (The International Court in The Hague) and in the national local system. The courts have the ability to enforce the law in the case of a failure of the parties to reach agreement through negotiation or mediation. There is a law, and a way to enforce it without the consent of the parties.

In international disputes, where states are involved, when problems arise due to opposing interests, such as security and/or resources, an outside enforcer cannot act where it is not acceptable to one or more of the parties involved. Ruling by the International Court can end the conflict only if the two countries agree to abide by its ruling.

Conflict prevention, de-escalation, management, and resolution can all be applied to conflicts involving water. The choice of the applicable process will depend on the particular circumstances and context of the water conflict. We will examine each of these key processes and then review their potential role in water conflicts.

## **2. THE ADR (ALTERNATIVE DISPUTE RESOLUTION) SPECTRUM**

On the spectrum between an agreement reached by the parties by direct negotiation, based on mutual understanding, and a binding decision rendered by a third party's authority in a procedure of adjudication, there are many other ways of dealing with disputes. These options and possibilities create "a menu" of alternative or appropriate dispute resolution (ADR) that parties may choose to use, with the intent of removing a potential source of conflict, preventing its escalation into a dispute, and finding the way back to a constructive cooperative and a potentially productive future working relationship.

The ADR "movement" started in the United States in the 1970s in response to the need to find more efficient and effective alternatives to litigation. Today, ADR is

flourishing throughout the world because it has proven itself, in multiple ways, to be a better way to resolve disputes.

The search for efficient and better ways to resolve disputes, and the art of managing conflicts, are as old as humanity itself, yet it has only been within the last thirty years or so that ADR as a movement has begun to be embraced enthusiastically by the legal system. More recently, ADR has become institutionalized as part of many court systems and system for justice as a whole throughout the world.

The first ADR method to gain acceptance was arbitration, which shared many of its practices and procedures with the judicial system, including the judge (or arbitrator) deciding the outcome of the dispute. ADR has matured and developed, and mediation is being received as a preferred alternative and has become widely accepted as a process providing more flexibility and less procedural complexity.

The US Federal Civil Rights Act (1964) led to the formation of the CRS (Community Relations Service in the US Department of Justice), which was mandated to help "communities and persons therein in resolving disputes, disagreements, or difficulties relating to discriminatory practices based on race, color, or national origin" (Moore, 1996).

"Mediators" were asked to assist in resolving disputes of any sort, and not only to deal with issues of discrimination (Goldberg et al., 1992).

The US federal government funded Neighborhood Justice Centers (NJC), provide free or low-cost mediation services. Throughout the United States and other countries, the courts became involved in mediation, following Professor Frank Sander's (Harvard University) vision of a courthouse that would become a dispute resolution center – a "multi-door courthouse" – where each case would be referred to a process most appropriate to it. The NJC's became part of a city-based, court-based, or district attorney-based alternative dispute resolution service.

The American Bar Association took a proactive role in the process and created CPR – The Center for Public Resources center – which provides ADR services.

Following an act of Congress (1990), federal agencies are obligated to use mediation in certain civil cases before going to court. Many states passed a law requiring mandatory mediation. In the private sector, many large US and multinational companies signed a mediation pledge, according to which they use mediation before going to court.

Several countries are experiencing similar growth while continuing to develop new and creative ADR processes and applications. Canada, New Zealand, Australia, and the United Kingdom have become pioneers in the field. In the United Kingdom, the Advisory, Conciliation and Arbitration Service (ACAS) was set up in 1974 to deal with industrial disputes, and at the end of the 1980s commercial mediation services became available, corresponding to the Lord Chancellor's statement in a television interview, "Mediation and other methods of resolving disputes earlier, without going to court, produce satisfactory results to both sides are, I think, very much to be encouraged" (Acland, 1990).

The ADR movement has been gaining popularity, and a movement that started as an answer to needs of the judicial system, has generated interest in a variety of fields (such as education, society, environment, international, and gender concerns).

In the 1980s, the US National Association of Mediation in Education (NAME) was founded, and a large variety of ADR programs, including negotiation, problem solving, and mediation was introduced in schools.

A variety of skills and techniques are taught: communication skills, different approaches of managing conflicts effectively, tracing needs and real interests, moving from positions to interests, how to deal with intense emotions, re-framing, open questions, and so on. The expansion of these programs and practices in education is becoming increasingly widespread. In 1997, there were over 8,500 school-based

conflict resolution programs in the United States, taught in over 86,000 public schools.

Alongside the search for ways to solve or manage diversities that turn into disputes and help people manage/solve existing disputes, advocates of ADR emphasize the need to develop and use the skills resulting from diversity that can help to prevent the escalation of disputes; this can be done by using joint problem solving in conflict situations, in order to enhance cooperation for the improvement of future relations.

### **3. NEGOTIATION: PRINCIPLES AND PROCEDURES**

Goldberg, Sander, and Rogers in *Dispute Resolution: Negotiation, Mediation, and Other Processes* (1992) define negotiation as "communication for the purpose of persuasion." Negotiation is a process in which parties to a dispute discuss possible outcomes directly with each other. Parties exchange proposals and demands, make arguments, and continue the discussion until a solution is reached, or an impasse declared.

In negotiations there are three approaches to resolving the dispute, each with a different orientation and focus – interest-based, rights-based, and power-based – and they can result in different outcomes (Ury et al., 1993).

#### INTEREST-BASED NEGOTIATION

This approach shifts the focus of the discussion from positions to interests. Because there are many interests underlying any position, a discussion based on interests opens up a range of possibilities and creative options, whereas positions very often cannot be reconciled and may therefore lead to a dead end. The dialogue on interest should be transparent, in order for the parties to arrive at an agreement that will satisfy the needs and interests of the parties.

While interest-based negotiations have the potential of leading to the best outcomes, the parties may not adopt it, and therefore we often find that negotiations are "rights-based" or "power-based."

#### RIGHTS-BASED NEGOTIATION

When negotiations between parties fail, the parties may then attempt to resort to what they consider to be their rights. This means appealing to the court (local, national, or international) and will result in a legal process in which the law is the dominant feature.

#### POWER-BASED NEGOTIATION

Resorting to threat or even violence as a way of communication for the purpose of persuasion is called power-based negotiation (for example, the posture of the Americans in the Cuban missile crisis).

Rights-based and power-based approaches are used at times when parties cannot or are not willing to resolve their issues through interest-based negotiation.

#### **3.1. Competitive and Integrative Models**

Negotiations are characterized by polarity between two extremes:

- Competition – Cooperation
- Opposing interests – Common interests

Competition and opposing interests lead to a requirement by the parties to divide the assets or resources under dispute. They lead to "dividing the pie" or "claiming value,"

in other words a “zero-sum game.” On the other hand, when negotiations are based on cooperation and identification of common interests, this can lead to seeking opportunities for “increasing the pie” (which is also called “creating value”).

When negotiations are based on common interests, cooperation, and joint problem solving, this is called the “integrative or collaborative model.” This model was developed at PON (the Project On Negotiation) at Harvard University in the early 1980s.

It is useful for parties to negotiate over a number of issues or resources, since they can try to create value and maximize benefits by trade offs between them. This is because the order of priority among these issues for one party may differ from that of the other and provide an opportunity for exchanges. Therefore, the parties find ways to increase gains through creativity, originality, and linkage between issues to enlarge the overall pie, thereby creating value.

To provide an historical example of the difference between positions and interests, consider the issue of the Sinai in the dealings between President Anwar Sadat of Egypt and Prime Minister Menahem Begin of Israel, in the wake of the 1967 Six Day War. Each leader claimed that the territory of the Sinai, taken over by Israel in the war, belonged to his nation. This was their stated position. President Jimmy Carter, acting as mediator, interrogated the two leaders as to their interests, and identified them as follows: Egypt wanted sovereignty over the territory, in line with the national position that Egypt would not yield control over the territory which it considered to be its own; Israel’s interest was to have guarantees of security on its border with Egypt, in view of the threat it had been facing on this border previously. President Carter then proposed that the Sinai would be returned to sovereign Egyptian rule, but would remain a demilitarized zone. This creative solution satisfied the interests of both sides, and was therefore agreed.

The principles of the interest-based model can be used in any type of negotiations: from buying a car to resolving a conflict between the United States and Mexico over water, and from buying a company to dealing with the selection of a site for building a wastewater treatment plant.

Negotiation based on “rights” or “power” fall under the “adversarial, distributive, or competitive model,” where the parties try to get the best deal for themselves at a cost to the others. A gain for one side means a loss for the other.

Living in a society in which competition is part of the daily experience, we tend to think of competition as the only way to reach our goals. Competition is almost always at the expense of someone else. In the “conventional way,” a negotiation is “zero-sum game” – whatever one side wins the other side loses. Both of the parties assume that it would be best to ensure that they end the negotiation at the positive side of the equation.

### **3.2. Principles**

“The reason to negotiate is to produce something better than the results that you can obtain without negotiation” (Fisher et al., 1991). The goal is to reach an agreement that is acceptable to all parties, to which they remain committed, and which they indeed implement. This is the essence of interest-based negotiations, which has the following principles:

## INTERESTS-NEEDS

Interests are needs (food, shelter, security, and so on), desires, aspirations, fears, hopes, and concerns. Positions are what we want and demand. The interests are the reasons behind the position. In negotiating on the basis of interests, parties will need to:

- distinguish between positions and interests
- move from positions to interests
- list all the interests according to priority
- think of positions as only one of many solutions to the problem.

## ALTERNATIVES

Alternatives are those actions that one can take outside the negotiations, alone or possibly with a third partner, but without the party with whom one negotiates. The alternative that yields the best outcome for you is called the BATNA (*Best Alternative To a Negotiated Agreement*).

The BATNA is the "best alternative to a negotiated agreement." If any of your alternatives without negotiation is better than the deal on the negotiating table, you will obviously go to the best alternative. If however the deal on the table is better than any of your alternatives, it will be your BATNA. It is important to make sure that the alternatives are indeed realistic, and try to improve your BATNA, because the BATNA influences the way in which you conduct the negotiations.

Having a BATNA provides us with the ability to negotiate effectively, and provide the answers to the following:

- What are our alternatives if this negotiation reaches a dead end?
- Do we have an alternative at all if the negotiations fail?
- Which agreement do we consider (the one which is at least as good as our BATNA)?

## OPTIONS

This is the range of outcomes that the parties agree to consider during the negotiations. Options are outcomes that can enlarge the pie and create value with little or no extra cost to the parties.

In developing the options use the following criteria:

- Use brain storming among the parties to generate a list of options.
- Look to the interests in order to generate a broad range of options to choose from.
- Include options that will answer both parties' needs and interests.

## STANDARDS AND CRITERIA

Objective standards and criteria can be used in the negotiations to enable both parties to perceive the process as fair and legitimate. Objective standards and criteria include:

- market value of an asset or a resource
- the law regarding the matter being discussed
- precedents
- opinion of an expert
- priority of human water consumption over other users (in water issues).

## COMMUNICATION

This refers to all the means by which the parties communicate with each another, including spoken words, level and tone of speech, body language, and any other means that parties use to signal to one another. This is important because part of the message is not just the words, but also in the manner in which it is delivered. To consider these aspects one must:

- be attentive to all signals of communication
- speak clearly and exercise "active listening" (discussed in Section 3.3: Skills).

## RELATIONSHIP

This refers to the interpersonal and intergroup dynamics between all the parties to the negotiation. Proper consideration of these elements requires that one:

- Separate the people from the substance; that is, do not allow oneself to become personal, but stick to the matters being discussed.
- Consider that there are differences in the way in which people in other cultures value interpersonal relationships as a precondition to holding negotiations.

## AGREEMENT AND COMMITMENT

An agreement should be specific, realistic, operational, clear, and understood by all parties. It should be specific as to who will do what, how, when, and where.

In the agreement the parties should commit to what they have agreed. Before signing an agreement one should ask:

- Does the agreement anticipate future contingencies, to avoid surprises and disappointments that may result in motivation not to uphold it?
- Do we have the authority to sign this agreement?
- Does the other side have the authority to sign this agreement?
- Do we want a tentative agreement, subject to final approval?
- Do we want an interim agreement that covers only part of the issues and leaves the rest for a further and final agreement?

In interest-based negotiation one should strive to reach an agreement that will satisfy:

- all or most of our interests, and
- the other parties' interests in a way that will be acceptable to them.

One needs to ensure that the other parties' interests are met to a degree that will satisfy their interests because their interests are inextricably tied to one's own and both needs have to be met in order for the agreement to hold.

Be cognizant of parties that are absent from the negotiations who will be affected by them or have an influence on their outcome.

When Israel signed the contract with the Chinese on the Falcon aircraft, the agreement was satisfactory to both parties, the Israelis and the Chinese. Israel just forgot the third party – the United States – which was not interested in selling know how to the Chinese and objected to the deal. As a result, the agreement fell through, and Israel had to compensate the Chinese for not fulfilling the agreement.

### 3.3. Skills

#### COMMUNICATION SKILLS: ACTIVE LISTENING

This is one of the most important and difficult skills for a negotiator and a mediator. Active listening as a skill and technique are taught to, and applied by, negotiators and mediators to enhance their effectiveness during the process.

Active listening means stopping our inner voices, and truly listening to the other person. Listening will enable you to hear important information, and learn a great deal about the other party. By listening attentively you:

- Show interest in what the other party has to say.
- Show understanding to the way they feel, their positions and underlying issues, hidden agendas, demands, and priorities (showing understanding does not mean that you agree with what was said).
- Acknowledge that people like to be listened to, and when you listen, you create a positive atmosphere.
- Hope it may clarify many issues; make you understand the other side's point of view, and show respect to the other party's needs, hopes, and fears.
- Hope it may help to improve the relationship, and break the cycle of arguments.

#### COMMUNICATION SKILLS: TALKING CLEARLY AND PRECISELY

Effective negotiation is also making sure that whatever you said was understood in the way that you meant it to be. You have to speak clearly, phrase your sentences carefully, make sure that the other party listens to you, and check with the other party to make sure that they understood you correctly. Send messages that are comprehensive, and explain where you are coming from, your needs, hopes, and fears. While talking you have to assess if the other party is listening, and how they hear/receive your message.

#### RE-FRAMING POSITIONS AS INTERESTS

Re-framing is a way of giving feedback, and showing that you listened and understood what the other party said. It is restating and capturing the essence of what the other party said. One removes the negative tones, and translates the statements of positions into statements of interests and needs. When we start negotiating we have to identify the issues at the table. The issues have to be defined in a neutral and acceptable way to all, and not include any suggestions of the outcome, or judgment of any kind.

Typically, parties start the negotiation process by stating their position, and their conclusion of what to do based on it. If the one party opens the negotiation in this manner, that is, by stating a position, it is very helpful to re-frame it as an interest. It helps the parties to identify their interests, and move from position to interests.

The supplier to buyer at the municipality: "I am not going to supply you another pencil before I see some payment for my last shipment."  
The buyer: "So, you need a business that can pay you regularly for your supplies."

#### UNDERSTANDING AND PERCEPTION

The negotiation process is influenced by our perceptions and our interpretation of reality. Perceptions are influenced by personal experience, emotional state of mind, and cultural background.

Perception, as shown in Akira Kurosawa's film *Rashomon* (1951), varies from one individual to another; we know that four different people who witnessed the same murder may give four totally different accounts of what happened.

The negotiator and mediator have to keep eye contact, listen carefully, and make sure that they understood exactly what the other party said.

It is important to reframe what was said in order to make sure that what was said was understood and was indeed what was meant.

Make sure that what was said was understood correctly, and that the other party knows you have understood.

"Let me make sure that I understood what you said, when you said that we should go ahead with our plans: does it mean that you will be a full partner, or just our contractor?"

When you negotiate in India and the other party nods his head up and down, does it mean "yes"? In India it means "No."

#### OPEN QUESTIONS

Questions are an essential skill for the negotiator and mediator. When asking a closed question, we get "yes" or "no" for an answer. Often these types of questions are also leading questions "Would you agree that . . ." "Didn't you think that it was unfair . . ."

The closed questions, and the leading ones, do not provide us with the essential information we need at the negotiating table and they tend to close down the discussion.

"Do you want to buy this property?" will provide us only with a "yes-no" answer, which does not include all the important information regarding the intention/ability of the buyer.

"What are the problems that concern you?" is a question which will provide us with important information as to how they feel about it, what are their concerns, their plans, and so on.

"How do you view the offer Mr. Brown has just made?" is an open-ended question, while "Do you like Mr. Brown's offer?" is a closed question.

Open-ended questions such as: "What are in your opinion the possible advantages and disadvantages regarding his offer?" or "What would you need to clarify prior to your counter-offer?" provide us with important information that can help the process rather than bring it to a dead end.

You have to be aware of your prejudices, values, and biases when you ask the questions, so that if you have any they will not be evident from your tone or body language.

#### SEPARATE THE PEOPLE FROM THE PROBLEM

It is important to understand the other party's point of view, needs, interests, and concerns. One does not have to agree with the other point of view, just understand that it is legitimate to have a different point of view, needs, and concerns.

One has to separate the people from the problem. Removing the person usually does not remove or solve the problem. However, trying to separate the person from the problem is not always practicable. There are societies in which personal relationships have a very high value, and separating the two is difficult.

### 3.4. Cultural and Identity Aspects

International and ethnic conflicts have within them components that are intangible, hard to define and to identify: culture and identity. Without recognizing them, and dealing with them, the negotiation or mediation has little chance of success.

Faure and Rubin (1993) define culture as "a set of shared and enduring meanings, values, and beliefs that characterize national, ethnic, and other groups, and orient their behavior."

There are cultural differences between the individual and the collective. There are countries and cultures that stress the high value of collective responsibility and commitment to the group, while in others the stress is on individualism and responsibility to oneself.

The *Sulha* is the Arab traditional way of conflict resolution. It works because of the collective responsibility of the extended family (*hamula*). This responsibility and commitment to preserve the honor and reputation of the family prevents all members of the family (even those who did not participate personally in the ceremony, and future generations) from breaking the customs and laws of the *Sulha* (Jabur, 1993).

The *Sulha* is usually used in disputes such as family honor, killing, physical harm, or maiming. In desert areas and arid zones we find the use of the *Sulha* also in water disputes, as among the Bedouins in the south of Israel and the Berbers in Morocco. "Both Berbers and Bedouin follow this Islamic practice of a ritual ceremony of forgiveness. Once the ceremony is performed, the dispute may not be discussed – it is as if it never occurred" (Wolf, 2000). It is an effective and efficient way of resolving disputes in these communities.

Even in cultures with a high degree of collective responsibility (such as Japan and China), we find cases where individual goals are opposed to the collective ones.

We recognize the existence of sub-cultural differences in religions, organizations, and gender, and within various groups of professions (doctors, engineers, and so on). People who work in teams seem to demonstrate a collective responsibility, more so than pilots or athletes such as long-distance runners who are used to working individually.

It is possible that the subculture of a hydraulic engineer as a professional person, will clash with his/her national culture of a certain belief and attitude towards water as a symbol.

Culture is a very complex but important component, which should be taken into account in negotiation because it influences our perception of the world, our set of values, our actions, our decisions, and the results of the process.

When negotiating with people, one should keep in mind that negotiators have different personalities, they come from different backgrounds, carry certain values and beliefs, and that the differences in their culture can be manifested in several ways. One has to be aware of the many factors which may impact the negotiation: time, language, body signs, style, space, symbols, social and collective responsibility, and the tradition of the social system.

The Umatilla Basin conflict was over reserved water rights of the Indian Tribes for protection of the flow for fisheries, and for the use of the water by non-Indians for irrigation. This conflict over water rights not only carried within it the economic issues, but also had significant religious and cultural importance for the Indians, which had to be taken into consideration for the success of the consensus building process.

(<http://www.umatilla.nsn.us/basin.html>)

The cultural aspect is evident in ethnic conflicts within a country, and between nations. Negotiators from different cultures will value the element of time and space differently. Negotiators from some cultures are task-oriented and want to conclude the deal, while others are relationship-oriented, and will not reach an agreement before getting to know, and creating a relationship with, the other party.

Some negotiators perceive the negotiation process as a zero-sum game, a competitive process, while others will view it as a cooperative, joint problem-solving process. Some may come from social systems where force and power determine the results of the negotiation, and some from cultures where women are not accepted as negotiators.

Culture is manifested in the behavioral styles of nations or communities, norms of behavior, hierarchies of social system, and social behavior.

Negotiation can fail because one party is not sensitive to these cultural differences, or to the special communication style and decision-making pattern of their partners.

Identity as defined by J. Rothman "is people's collective need for dignity, recognition, safety, control, purpose, and efficacy." Many conflicts carry within them identity issues, and these conflicts may last many decades and be very destructive domestically (the conflict in Northern Ireland) or internationally (the conflict in Yugoslavia). Many international and group conflicts contain identity-based interests and needs that were not fulfilled (Rothman, 1993). These types of conflicts are very difficult to resolve and often require the assistance of a third party, acting as a facilitator/mediator. Sometimes a team of facilitators/mediators is used.

The approach to resolving cultural and identity-based conflicts is a combination of interest-based negotiation and the process of dialogue and consensus building. The "third party" would help to identify the parties to the negotiation and decide who the participants will be; conduct a conflict assessment by identifying the major issues and interests of the parties; and identify the reasons and motivation for participating and resolving the conflict. Because the process is voluntary, one has to:

- Understand the needs of the parties to participate.
- Build confidence in the process among the parties.
- Design the process as one that is open and honest.
- Provide equal access to data and information to all parties in order to build confidence in the process and the participants, facilitate their dialogue, assist in generating many creative options, and come to a consensus on the best option(s) and a solution acceptable to the parties.

It is then the responsibility of the parties to implement the agreed solution. These tasks may take place over an extended period of time, depending on the ability and willingness of the parties to work for mutual gain, and the nature and complexity of the negotiation.

### **3.5. Psychological Aspects**

The psychological attitude of individuals to negotiation, their personal perceptions, past experience, and expectations are manifested in rational or irrational decisions, which have an effect on the outcome of the negotiation.

When people engage in negotiation there are emotions involved that affect their attitude and actions. Anger, hurt, revenge, hope, and fear are all feelings that one brings to the negotiation table, and these feelings influence the process and have an impact on the outcome. These feelings have to be dealt with by the parties in order to reach a rational decision and resolve the dispute.

Negotiators arrive at the negotiation table not only with their personal feelings, but also with their personal tendencies and analysis of the situation. For example, the negotiator can be loss or risk averse, overconfident and optimistic, or unrealistic about the uncertainty of the negotiation outcome. These tendencies influence their behavior, and create obstacles, which may lead to unreasonable decisions (Tversky and Kahneman, 1995).

Some negotiators tend to assume that it is best not to disclose information if they want to succeed in the negotiation. Parties are sometimes too concerned with the fear of "being taken advantage of" to be able to think of the negotiation in terms of "joint problem solving." Parties in a competitive negotiation may be indifferent to the gains of the other, but more often this competitiveness leads the parties down an emotional path where minimizing gains or causing a loss to the other party becomes the goal, even at the expense of their own interests.

Many negotiators assume that the "pie is fixed" and therefore negotiate over position and not interests. The "fixed-pie bias" can prevent the parties from taking advantage of opportunities to enlarge the pie (Birk and Fox, 1999).

### **3.5.1. Psychological Traps**

Wanting to look tough and consistent in the eyes of the other party, and finding it important to prove – to themselves, to the constituencies at home, or to others – that one was right acting the way one did, may be a trap.

It is common for negotiators to focus and react to the other party and their attitude, moves, and tactics, rather than focusing on a strategy that would advance their own needs and interests. In many cases, this commitment to a course of action they started will be at a cost and will not achieve their own goals. As time moves on, parties to the negotiation feel that they have too much time, money, and ego invested, and backing off becomes less and less of an option (Bazerman and Neal, 1993).

Both sides will often start with extreme demands, expecting to compromise somewhere in the middle. Getting caught up in the struggle, not wanting to be the first to "blink," toughens the negotiation and makes both sides become more entrenched in their initial position.

Parties may wish to impress the others by acting strong, being consistent, and making sure that they will not be taken advantage of. This also involves a notion that negotiators adopt in the line of showing strength: if you have doubts – be overconfident. This, and the need to be in full control, does not allow the questioning of one's positions or the development of an ability to view things from different perspectives and consider different, sometimes more productive, approaches that would advance the negotiation.

Being committed to a certain position or course of action creates a bias in favor of the data consistent with this specific course of action. One is ready and able to "hear" data and information that will support this position, but not open to hear or accept new ideas. This course encourages the parties in further self-persuasion and rationalization concerning the correctness of their positions. It also entails holding on to one's positions without looking more deeply into the initial interests that may contradict the positions displayed.

This attitude will lead the parties to miss opportunities to create options (or find a trade off) that might enlarge the pie and benefit both sides.

Some negotiators would prefer to leave issues open or unresolved, and would even create a dispute rather than think they were defeated or were forced to make concessions. Instead of taking the risk of cooperating, some people would prefer the risk of competing, hoping to "win." Research indicates that many negotiators will choose a small sure win over a risky larger win (Bazerman, 1986).

Research indicates that people become more entrapped when:

- They are especially anxious about their appearance in the eyes of others.
- They believe their effectiveness is judged and criticized by others (Rubin, 1981).
- They tend to interpret the other party's offer of concession as a sign of weakness. This tendency makes one suspicious towards gestures of a constructive nature. Concession may be perceived as a "too easy gain" and rejected, while demands that are rejected or denied would be perceived as important. It is important to evaluate rationally what it is that one is about to lose or sacrifice. In many cases, an offer of concession may be perceived as an opportunity to demand and gain more, and instead of responding in a constructive manner, it leads to further toughening one's positions (Ross and LaCroix, 1996).

Other points that should be borne in mind are:

- When one is on a non-constructive course, the tendency is to expand and escalate. Conflicts independent of their initiating causes are developed, and are likely to continue after the initiating causes have been solved (Deutsch, 1973).
- Negotiators should try and search for the issues that both parties share in common, rather than the issues that would further expand the differences and create more barriers and dichotomies between the parties, misinterpretations of the other's line of thought, and reduction of their own ability to resolve the dispute.
- The non-cooperative way of perceiving negotiation is not necessarily an outcome of people's personality or character, but part of the western competitive society. It may be due to the fact that the parties do not know another way.

In the "cooperative approach" it is important to share interests that will enable the parties to see the picture as a whole, evaluating the issues and interests, so that an agreement will be reached that will be acceptable to all parties, and not leave any ungarnered gains on the negotiating table.

All parties have to understand that they have a common stake in the situation and that there is more to be gained by negotiating and exchanging ideas than by competing.

A basic motivation in an "interest-based negotiation" is to collaborate for the mutual benefit of all parties. Putting one's needs and interests on the negotiation table includes the presupposition that the other party is willing to take them into account and show understanding of those needs. Realizing that even opposing needs can be dealt with in a different way may lead to some creative new ideas.

A well-known example that best describes the idea of the cooperative, integrative approach to negotiation is Mary Parker Follet's story of the two sisters who both wanted the same orange. A non-cooperative but reasonable solution would be to cut it in half, each of the sisters getting her share. But, underestimating the true needs and interests of each of the sisters, it is revealed that while one wants to squeeze the orange in order to drink its juice, the other is aiming for its rind, planning to bake a cake with it. In this case it is possible to reach a solution that allows each of the sisters to gain more than by the presumably reasonable solution of cutting it in half (Fox and Urwick, 1973).

In more complex situations, where the parties plan on future cooperation, a truly integrative negotiation would lead not only to a mutually agreed solution, but enlarge the pie by not leaving joint gains on the table.

To reach an innovative solution, trust has to be gained. Trust makes it possible to open up consideration of the other party's perspective, needs, and interests.

Sharing information, discussing concerns, talking about needs, and developing ways of thinking together will create a cooperative mode for a joint problem-solving negotiation process.

Learning the strategies and techniques of interest-based negotiation, and understanding its benefits, make it possible to transform not only the approach towards negotiation, but also people's perception of the way one should deal with conflicts.

In many cases, where suspicion and mistrust are involved, where the dynamic is negative and destructive, and the negotiation process has come to a standstill, it is beneficial to use a neutral third party, a mediator, who will help facilitate the negotiation process. A third party's presence may help to change the atmosphere. In the presence of a neutral, some of the antagonism and suspicions may be transformed into rational evaluation of the situation, helping to overcome the distrust in order to cross barriers that stand in the way of resolution.

### **3.6. International Negotiation**

In past decades, only diplomats conducted international negotiation and agreements between countries. Negotiating today is not restricted to the diplomatic corps; it involves professional people, experts, non-governmental organizations, local interested groups, local authorities, and international entities, all of which have an impact on the process.

Cultural issues play a major part in international negotiation, and have a significant impact on it. A strong personal relationship and trust between the negotiators can be a positive force in future agreements.

Issues such as personal relations, time, sovereignty, face-saving, mode of bargaining, and hierarchy, which are culturally based, need to be considered during negotiations between different nations, societies, and ethnic groups.

Today it is realized that conflicts and the issues involved are very complex, the outcomes are far reaching, and can often affect other nations, a region, or the world.

The international negotiation process is more complex, because of the various interdependencies between countries, cultural issues, and past history, and the fact that individual people, or a group of people negotiate on behalf of a collective. Their culture, psychology, emotional state, behavior, ethics, values, and private agendas may affect the outcome of the negotiation.

In the past decades the world has become one global village. Distances are smaller, communication means are easier and faster, and the economy has become a major factor in international relations. A conflict between two or more countries may affect a whole region.

The conflict in Yugoslavia had an adverse effect economically on the shipping and transport industry on the Danube, with very heavy financial losses for countries such as Hungary, Ukraine, Germany, Romania, and Austria, which were not connected with the conflict in Yugoslavia (Egglestone, 1999).

The Israeli-Palestinian conflict affects the whole region, especially the economy and political situation of Israel and the Palestinian Authority, but also neighboring countries such as Egypt and Jordan that are negatively affected.

A conflict in one country may affect many markets around the world, as dependency between nations, economies, and international institutions – along with conflict situations – has increased.

The terrorist attack in New York on September 11 2001 had a serious economic effect not only on the US but also on the global economy.

We live in a new and changing world, in which negotiation plays a major role in resolving these conflicts.

The bilateral arena is simpler than the multilateral arena because of the fact that there are only two adversaries with conflicting interests. The multilateral arena is a very involved one because of the fact that there are a number of parties, and many issues and interests at stake. The parties have to manage this complex situation by simplifying, structuring, and deciding on the priorities of issues. They have to manage the proceedings, and the orientation that will provide a direction toward a mutually agreeable outcome (Zartman, 1994; see also article by Young in that volume).

In the process of negotiation between countries, or international entities, one nation often needs to build a coalition with others to achieve its goals. The parties to the coalition do not have necessarily the same interests, priorities, or values, but have some similar objectives. Countries who try to form a coalition often use power, economic or military dependencies, and other strategies to induce other countries to join the coalition.

The United States built a coalition with many countries during the Gulf war, and in the war against terrorism in Afghanistan.

Coalitions are created by negotiation with the countries one wants as allies and partners, against another country (Watkins and Rosegrant, 1996).

Turkey, while in conflict with Iraq and Syria, has created an economic and military alliance with Israel, buying military equipment from Israel, and is willing to sell water to Israel, while Syria, who in the past had a conflict with Iraq, strengthened her economic ties with that country (Francona, 1999).  
[www.suit101.com/article/ctm/28688](http://www.suit101.com/article/ctm/28688)

Parties can form coalitions that may change in time, and with them the issues and interests may shift in the ladder of priorities. Multilateral agreements are always reached by consensus.

Bangladesh, which formed a coalition with India who helped in gaining its independence from Pakistan, is threatening to cancel the Treaty of Friendship with India because of the issues of reduced quantities of water and increased salinity in the water, which endangers the existence of millions in Bangladesh (Frederick, 1996).

Often countries negotiate over issues that influence directly the local/domestic publics. These publics may determine the outcome of the negotiation by supporting or

opposing an agreement. It is important for a country to reach a consensus with the local domestic entities before an international agreement is reached.

The Dutch nurseries and the Pure Water Institution sued the Alsace Potassium Co.; the fact that there was a lawsuit against a French company influenced the French Government in their decision to ratify the 1979 Chemical Agreement (Haftendorn, 1999).

### **3.7. Negotiations Over Water**

An increasing number of states are experiencing occasional or lasting water stress, yet in most cases mechanisms and institutions to manage disputes over water resources are either absent or inadequate. Competition over this precious resource could increasingly become a source of tension – and even conflict – between states and sectors. History has often shown that the need for freshwater can cause different users to cooperate, rather than allow confrontations that could jeopardize the water supplies. Competition may arise between different groups or sectors (agriculture and cities), between countries (upstream–downstream), and over allocation and use of water between urban development and the environment.

Water Conflicts can be resolved in various ways:

- Force: a decision imposed by force on one or more of the parties.
- Adjudication: a decision rendered by an authority, state, institution, Court of Law, or Special Master. Some states assign a “Special Master” who will act as a judge or arbitrator in water disputes.
- Negotiation: a decision requiring an agreement among the parties.

The tendency for resolution in the world today is to use interest-based negotiation and mediation, equitable and reasonable use of water, and reach an agreement where the parties will jointly manage the shared water resources.

#### **3.7.1. International Water Negotiations/Conflicts**

Water has always been an integral part of a nation’s history, religion, and culture, and carries an important symbolic importance. Problems and disputes over water in the national and international arena are a fact of life. Water, as a scarce resource, has always been a reason for conflicts between people, communities, and nations. Conflicts over water exist in many parts of the world.

These conflicts can arise nationally and internationally and are due to the competing needs for and utilization of the water: drinking, irrigation, transportation, flood control, hydro-electricity, fishing, recreation, and the environment.

Conflicts can arise between riparians situated upstream – who control the sources – and those downstream, who are at a disadvantage (e.g. the Nile, Sudan and Egypt), between those on the two banks of a river (the Parana River between Paraguay and Brazil), or around a lake (Lake Chad and The Sea of Galilee). Conflicts arise because of a range of issues.

#### **QUANTITY**

Concerns over quantity arise when the resource is not sufficient to meet all the needs of the riparian countries, frequently because of rising demands due to population growth and improved standards of living. A country upstream, which controls the source, often claims sovereignty over the water, resulting in a conflict with the downstream countries.

Turkey claims sovereignty over the Euphrates and Tigris rivers, and started the GAP project, which will be beneficial to Turkey. This is a source of concern to Syria and Iraq downstream, and has resulted in tension with Turkey. (<http://www.mfa.gov.tr/grupa.ad/adg/adgc/html>)

#### WATER QUALITY AND POLLUTION

When upstream countries cause the pollution of a river and degrade the quality of the water reaching downstream riparians, water quality and pollution can cause conflicts between the users.

Many countries along its route use the river Rhine. Pollution of the river has been caused by the chemical industries of Germany, Switzerland, and France, and the shipping industry along the river. The shipping issue was resolved in 1950 by creating an International Commission. The chemical pollution imposed a burden on the Netherlands, who use the water mainly for drinking and agricultural uses. The case was brought to the European Court of Justice.

This conflict was aggravated by serious chemical accidents, which resulted in the 1987 and 1991 Chemical Agreement (Haftendorn, 1999).

#### FLOODS

Upstream countries or landowners influence downstream flooding by clearing their land of trees and natural vegetation, urban development, building drainage works, training the river, and building dikes. This augments and accelerates the flow in the river, which increases the probability and severity of downstream flooding.

The Oder basin is prone to flooding, with recurring disastrous results. The joint plan developed by Germany, Poland and the Czech Republic to prevent disasters failed because of the incompatible interests of the parties. The conflict still exists and the region is still at risk. There is hope for a resolution of the problem, due to the desire of the parties to join the EU, and its capacity to act as a mediator/facilitator or even arbitrator in the case (Haftendorn, 1999).

#### HYDROELECTRICITY

Dams used for hydroelectric production compete with other uses of water, since maximization of production requires the dams to be as full as possible and release water according to the demands for electricity. The operating strategy of a hydroelectric dam is frequently incompatible with water supply, flood protection, fish requirements, recreational uses of the river, and ecological considerations. Thus, hydroelectricity projects in an upstream country can easily cause a conflict with downstream riparians.

India, Nepal, and Bangladesh are at conflict over how to use the water of the Ganges-Brahmaputra. India and Nepal upstream have an interest in the hydroelectric power potential, while Bangladesh has an interest in flood control, and concerns over water shortage. (<http://inter.mfa.tr/GRUPF/water>)

## ENVIRONMENT AND ECOLOGY

Countries and states are often in conflict over environmental and ecological issues related to water.

The conflict between the United States and Mexico, over the increase of the nitrate content and the salinity of the Colorado caused by the United States, was resolved in 1973 with a joint protocol. The United States agreed to build the Yuma plant in order to reduce the salinity of the water and help it reach an acceptable quality (Haftendorn 1999).

The conflict between China and Russia relates to ecological deterioration and environmental problems in Russia. China, which is the upstream country on the Tumen River, does not have wastewater treatment plants and is polluting the river to such an extent that the fish in the river contain a high level of chemicals that cause cancer, and thus the water in the lower Tumen water is not suitable for municipal or industrial use. This situation has increased the tension between the two countries, and seems to have gone beyond the environmental and ecological issues, and has affected the security issues between them (Hunter, 1998).

## WATER AS AN ELEMENT IN BROADER CONFLICTS

In certain cases we find that water is used as a negotiation tool in conflicts that are linked with other issues in a broader set of issues between neighboring countries.

Water can be used as a weapon by one riparian against another in conflicts and issues relating to security and/or border issues.

- Turkey has threatened to reduce the flow of water to Syria in order to force the Syrians to stop supporting the Kurdish rebels – a major national and security issue in Turkey (Frederick, 1996).
- In the 1973 protocol between the United States and Mexico over the Colorado, the United States agreed to reduce the salinity of the water and ensure an acceptable quality, while Mexico agreed to combat illegal immigration and drug traffic to the United States (Haftendorn, 1999).

## ECONOMIC ISSUES

Economic interests over water and its use can cause conflicts that change the balance of power in a region. This happens when some of the countries join in a coalition that influences the region beyond the water dispute.

The Gabcikovo-Nagymaros Dam project was proposed in order to provide for electricity, flood control, and improved navigation on the Danube for Hungary and Czechoslovakia. The initiative resulted in the 1977 bilateral treaty.

In 1988 Hungary withdrew from the project because of internal political pressures and its environmental concerns. Slovakia, which was the natural successor to the rights and obligations of Czechoslovakia, continued the project and constructed a channel to divert water of the Danube from Hungary. This project is economically important for Slovakia to produce much needed electricity. In 1992, Hungary took Slovakia to the International Court in The Hague, claiming environmental damages for its unilateral action in diverting the Danube. The court

did not make a definitive ruling but rather urged the parties to reach an agreed solution (Lipschuts, 1997). <http://www.ecsp.si.edu/ecsplib.nsf>

Until 1960, the Aral Sea was the fourth largest lake in the world. Excessive use of the water of the two rivers that feed this inland lake – the Amu Darya and Syr Darya – and of the lake itself for irrigation in the time of the former Soviet Union created an ecological and economic disaster. The fishing industry disappeared, salinity harmed the crops, water was polluted with pesticides, and the Aral Sea was reduced to about a quarter of its natural size. This has also had an adverse impact on human health and mortality, and caused desertification of the region. The five Central Asian Republics that share the water of the rivers and the lake are trying to deal with these issues and cooperate in jointly managing the transboundary water resources (Vinogradov and Langford, 1998).

### **3.7.2. Intra-national Water Negotiations/Disputes**

In the national arena conflicts can arise between two states, counties, or sectors: often the farming community and the cities, or hydroelectricity and the other interests. The reasons for the conflict are similar to those of the international arena: quality, quantity, pollution, and so on. National conflicts are sometimes more violent than the international ones, and result in severe damage, displacement of people, or even loss of life.

Water allocation from the Cauvery River in Southern India to Tamil Nadu resulted in a violent conflict where more than fifty people lost their lives (Ehrlich et al., 2000).

The Saradar Sarovar Dam project in India's Naramada Valley was developed in 1985 to provide irrigation and electricity for the region. The plan was to build major, medium, and small dams on the Naramada and its tributaries. This project would have displaced 200,000 tribal people and destroyed their villages during the monsoon rains.

Thousands of people marched in New Delhi to protest the project and expose the government's false claim that the people were rehabilitated and resettled. The protests from the tribal people and environmentalist groups caused the World Bank to withdraw its support of \$900 million (Noronha, 1999).

In resolving national conflicts we find negotiations at one end of the spectrum and adjudication at the other, while between them are a number of processes such as mediation, arbitration, and consensus building.

Water Rights in Klamath Basin in Oregon are being adjudicated. Thirty-nine public water reserve claims were filed. The adjudication will determine the amount, use, location, and relative priority of each of the water rights. The parties include all the Federal Agencies and Indian members. (<http://www.wrd.state.or.us/>)

When dealing with local and national water conflicts, the parties in conflict have in the past often gone to court.

The "Tri-State Water War" between Georgia, Alabama, and Florida, started in the 1990s when Atlanta planned to withdraw 50 percent more water from the Chattahoochee River. Alabama, being the downstream state, saw that as a threat to its water supply, and Florida joined the dispute, claiming that the plan would reduce its water supply and cause damage to the oyster industry. This conflict resulted in a lawsuit, in which the parties were asked to negotiate a solution. The negotiation has resulted so far in two Compacts dealing with the two different river basins, but it is still an active dispute (University of Mississippi report). (<http://www.olemiss.edu/orgs/masglp/8disputes.html>)

We know from experience, that the court often does not manage to resolve local disputes in a satisfactory way. See the "Tri-State Water War," The Gabcikovo-Nagyvaros Dam (above), the Salton Sea (below), and other cases. The judicial process has a number of disadvantages:

- It is very costly in time and money.
- It does not always provide an adequate answer to the special needs of the parties.
- It does not always provide an adequate answer to the special needs of society.
- The courts usually focus on procedural issues rather than the substantive issues that are the basis for the dispute.
- The judge may lack the knowledge and ability to consider technical issues.
- The judicial process is an adversarial process and damages the relationship between the disputants.

In many countries, these days, when an internal water conflict erupts, the institutions, communities, and parties involved often forego the option of the court in favor of one of the alternative processes such as negotiation, mediation, or consensus building as a way to resolve the conflict.

The public, which for decades had no say in decisions that involved its interests, became active and demanded an active role in the process and a say in the outcome with which the people will have to live.

In California, Imperial and Riverside counties, the Imperial Water District, and the Coachella Valley Water Authority, had a problem of rising levels in the Salton Sea, which resulted in a constant increase in its salinity. This had an adverse effect on the farming community, the recreational industry, and millions of people. The legal battles lasted years, costing over \$100 million, and the court decisions only intensified the problems. As a result of a mediation process, a joint power agency was created, and the parties are working to create a viable, cost-effective, solution. (<http://www.sci.sdsu.edu/SaltonSea.WaterQuality.htm>)

### **3.8. Treaties**

States have a right under international law to control their resources, and are reluctant to go to a court of law to resolve their international and regional dispute over water, or to be restricted by international conventions. Countries can refuse to go to court, and no one can force them to come.

There are two international conventions regarding fresh water:

- The Helsinki Convention (1992) on the protection and use of transboundary watercourses and international lakes
- The UN Convention (1997) on the non-navigational uses of international watercourses.

The fact that it took twenty-seven years to conclude the 1997 UN Convention and bring it to a vote offers clear testimony to the difficulties in agreeing on the legal principles for management of transboundary waters. The international water law, embodied in the 1997 UN Convention and its predecessor documents, includes a list of considerations and some criteria according to which international waters are to be managed jointly by the riparians. However, these provide only a framework, and the specifics have to be worked out in each case by the parties. Thus, resorting to international law provides guidelines, not a solution, and the parties have to reach an agreement through negotiation.

In a project carried out at the Department of Geosciences at Oregon State University, directed by Professor Aaron Wolf, there is a very useful and comprehensive database (<http://terra.geo.orst.edu/users/tfdd>) listing more than 400 treaties on international fresh water that were negotiated in the years between 1820 and 2001. The existence and persistence of so many treaties demonstrates that in most cases states are interested in avoiding conflict, and construct mechanisms for resolving them in alternative ways.

From history and experience we learn that even in cases of water conflict states choose collaborative ways to resolve the problem. More general shared interests of the riparian countries reinforce the motivation to agree on water management. These include development of the basin, environmental and ecological interests, the tourist industry, shipping and transportation, economic and agricultural development, and many other considerations.

Joint water management as a way of resolving problems has proven to be an efficient and effective way to work in collaboration. The following are cases in point:

- *The Rio del Plata Basin*  
<http://www.transboundarywaters.orst.edu/projects/casestudies/laplata.html>  
(<http://www.ag.arizona.edu/~lmich>)
- *The Danube Basin*  
<http://www.transboundarywaters.orst.edu/projects/casestudies/danube.html>  
(<http://www.danube.org/news.html#8>)
- *The Mekong Delta*  
<http://www.transboundarywaters.orst.edu/projects/casestudies/mekong.html>  
(<http://www.fw.umn.edu/ISEES/publcty/wtrcflt.html>)

## 4. MEDIATION

Mediation is a process that employs a neutral/impartial person or persons to facilitate negotiation between the parties to a dispute in an effort to reach a mutually accepted resolution. Mediation is a process close in its premises to negotiation: "mediation is an assisted and facilitated negotiation carried out by a third party" (Goldberg at al., 1992).

The mediators, who are hired, appointed, or volunteer to help in managing the process, should have no direct interest in the conflict and its outcome, and no power to render a decision. They have control over the process, but not over its outcome. Power is vested in the parties, who have control over the outcome: they are the architects of the solution.

The mediator's role is multiple: to help the parties think in new and innovative ways, to avoid the pitfalls of adopting rigid positions instead of looking after their interests, to smooth discussions when there is animosity between the parties that renders the discussions futile, and in general to steer the process away from negative outcomes and possible breakdown towards joint gains.

Mediation has become a very important and viable alternative to adjudication and arbitration in the legal system (labor disputes, family, business, and commercial disputes). In some countries and states we find laws of mandatory mediation, as a way to encourage the parties to the dispute to use the mediation process as a preferred way to resolve disputes.

Unlike the process of facilitation, where the third party merely hosts the parties and encourages them to continue negotiating in a neutral, welcoming environment, the mediator plays a more active role. The mediator not only facilitates but also designs the process, and assists and helps the parties to get to the root of their conflict, to understand their interests, and reach a resolution agreed by all concerned.

A mediator should study the substance of the dispute, and try to identify the issues in conflict, using tools such as re-framing, active listening, open-ended questions, and his/her analytical skills.

Mediation is a voluntary process (except where there is a law of mandatory mediation in place). The parties agree to the process, the content is presented through the mediation, and the parties control the resolution of the dispute.

Because the participation of the parties and the mediator is voluntary, the parties and/or the mediator have the freedom to leave the process at any time. The mediator may decide to stop the process for ethical or other reasons, and the parties may decide that they are not satisfied with the process. The agreement, which is reached between the parties, is voluntary; the parties own it and are responsible for implementing it. The agreement is validated and ratified by the courts.

#### **4.1. The Advantages of Mediation**

Mediation has a special advantage when the parties have ongoing relations that must continue after the dispute is managed, since the agreement is by consent and none of the parties should have reason to feel they are the losers. It is therefore useful in family relations, disputes between neighbors, in labor relations, between business partners, and adjacent political entities. Mediation creates a foundation for resuming the relation after the particular issue has been resolved. Additional advantages of mediation are discussed below.

##### **FLEXIBILITY**

The mediation process can be adapted to meet the needs of the parties during the process and in formulating a solution. This may involve the choice over location of the mediation, the time frame, the people who are to be involved, the selection of acceptable objective criteria, and many other choices related to the process. Most important, mediation is not conducted under a fixed set of rules, as is the case in a court of law.

##### **INFORMALITY**

Mediation is an informal process, designed to suit the needs of the parties. It appeals to parties who feel that they want to be partners in the process of resolving their conflict and take part in the decision on the fate of their dispute. It allows the parties to present their arguments in an informal manner, not bound by the procedures of the legal system. Mediation is a form of guided dialogue, where the parties have the ability to express their feelings, not only facts, so that venting anger can help in reaching an agreed solution.

#### CONFIDENTIALITY

Mediation is confidential, off the record, and away from the public eye and the press. The mediator is bound not to divulge any of the information he/she hears from one party to the other or to anyone else without permission, so the parties can feel free to confide in the mediator. The mediator will not share the confidential information, not even with a judge. Mediators can meet with each party in separate and private caucus, to assist them in understanding their own underlying interests and those of the other party.

#### NON-BINDING NATURE

Mediators assist the parties to reach a negotiated settlement, an agreement, which is then usually put in writing. If the parties are not happy with the process or the outcome, they have not relinquished the right to use another dispute resolution mechanism in order to resolve their dispute, for example they can go to court or to an arbitrator.

#### SAVINGS ON RESOURCES

Mediation is generally faster than the judicial process, it is less costly, and saves on resources (time, money, and energy). It can often be scheduled at the convenience of the parties, avoiding long court delays and associated costs. In mediation, the focus is on the future, but it does not ignore the past, which provides the information about the issues and the causes of the conflict. This minimizes non-productive justifications, assessment of "who is right," and differing views of "the truth."

#### MAINTENANCE AND OFTEN IMPROVEMENT OF THE RELATIONSHIP

One of the main reasons for using mediation as an alternative to the judicial process is to preserve and potentially improve relationships between the parties. The mediation process works well in the case of a long-term relationship or interest-based disputes. In the process, the parties gain understanding of each other's motives, needs, and interests. This understanding can often improve the relationship between them. When the relationship is maintained and improved through the resolution of the conflict, the parties have an increased capacity both to maintain the agreement and to resolve future conflicts.

### **4.2. Positive Results of Mediation**

The positive aspects of mediation are:

- It helps to identify the true issues of the dispute.
- It resolves some or all of the issues.
- Agreement can be reached on all or part of the issues of the dispute.
- The needs and interests of the parties are met (in part or in full).
- The parties reach an understanding of the true cause of the dispute.
- The parties reach an understanding of each other's needs and interests.
- It provides the possibility of preserving the relationship.
- An improved relationship may result.

### **4.3. The Role of the Mediator**

The mediator should consider the following to be part of her/his task:

- Help to coordinate the meetings.
- Introduce the parties.
- Explain the process to the parties.

- Set the agenda and rules.
- Create a cease-fire between the parties.
- Open communication channels.
- Gain the confidence and trust of the parties.
- Gather information and identify obstacles.
- Allow the parties to express feelings and vent emotions.
- Help the parties to identify and understand their interests and priorities.
- Help the parties with brainstorming creative options and solutions.
- Help in defining acceptable objective criteria.
- Help the parties understand the limitations of their demands through what is known as "a reality test."
- Help in evaluating alternatives.
- Allow the process to move forward according to the needs and pace of the parties.
- Help in crafting the agreement.
- Help in validating the agreement by the courts (if there is a court that has jurisdiction).

#### **4.4. Skills and Tools of a Good Mediator**

- listening skills, active listening
- strong negotiating skills (because mediation is facilitated negotiation)
- the ability to create trust among the parties
- the ability to identify the issues of the dispute
- patience, endurance, and perseverance
- thoughtfulness, empathy, and flexibility
- common sense, rational thinking
- a likeable personality
- experience, education, training
- neutral, impartial
- problem-solving skills, creativity
- ability to reframe the parties views in softer terms and summarize what was said
- good people skills
- asking open-ended questions.

"What are in your opinion, the origins of this conflict?"

"Had you been given the chance back in 1997, what would you have said to the other party?"

"What kind of a relationship would you like to maintain with the other party?"

#### **4.5. The Problems that the Mediator Attempts to Resolve**

- litigation issues
- business interests
- personal / professional relationship interests
- community interests.

#### **4.6. Techniques and Strategies**

Mediators use a variety of strategies and techniques during mediation. They develop their personal style depending on their personality, experience, and beliefs in the role of mediation. The mediators have no power as far as what the outcome of the process

will be, but they have the responsibility to design the process, set the agenda, and control it. They have to bring the parties to trust them, and guide them towards a settlement.

Mediators may use experts and expertise in certain disputed issues, and seek guidance for resolution of the dispute on the basis of law, industry practice, and so on.

#### THE FACILITATIVE STRATEGY

The mediator uses strategies and techniques of facilitating and assists the parties to understand their situation and interests, and encourages them to communicate, create options, and reach an agreement.

During mediation the focus is on the future, but the process does not ignore the past, which provides the information about the issues and the causes of the conflict.

Mediators elicit ideas from each side for possible resolution, and assist the parties to develop a negotiated settlement, an agreement, which is usually put into writing, and can be ratified by the court.

#### THE EVALUATIVE STRATEGY

The mediator will focus on the legal demands, evaluate the case, offer an opinion, and predict the outcome of the case in court. In such an approach, the mediators do not concern themselves with the process or the relationship of the parties. They focus on the settlement of the case and suggest solutions to the problem.

### **4.7. Models and Approaches to Mediation**

There are several different approaches and mediation models:

- the model of co-mediation
- the model of a single mediator
- the model of a panel of mediators

Mediation is not an easy process, and co-mediation has many advantages which are very beneficial, but only if the mediators are compatible and know how to work together.

- The mediators complement each other (in divorce cases a lawyer with a psychologist or social worker can be very effective; one can strategize and the other can reframe positively).
- They can divide the tasks (one can listen and the other can take notes).
- They can strategize and brainstorm together.
- If one gets "stuck," the other can proceed.
- They can compare their perception of what was really said by the parties, and so on.

If however the mediators do not know one another, or are not compatible, the process may work better with a single mediator.

Single mediation is a very common model which is used for economic reasons, and because mediators enjoy working alone and being in control of the process. Experienced mediators who work alone are doing excellent work.

The model of a panel of mediators is used in very complex cases that involve multi-party mediation, and in cases of environmental mediation. The models vary in terms of the methods, techniques, and the process of mediation, and in the particular circumstances of the dispute in question.

There are several approaches to mediation, and we will present the two that are most used. While the special characteristics and aims of mediation remain the same, they can be achieved in different ways, by different approaches, as will be discussed

below. The mediator needs to adopt one of these approaches, or a combination, depending on the specifics of the case and the nature of the parties, as well as his/her own beliefs, experience, and expertise.

#### THE EVALUATIVE APPROACH

Evaluative mediation is a process where the mediator is the one who provides guidance as to the appropriate grounds for settlement, on the basis of the law or her/his experience and knowledge in a specific field of expertise.

The mediator's creativity and knowledge are used in order to help the parties navigate towards a settlement. In the evaluative approach the mediator tries to help the disputants to view realistically the strength and weaknesses of their case and claims. The mediator offers solutions, and even tries to predict the likely outcome in court, in case the mediation process fails.

As the mediator has a dominant role in the process, the evaluative mediator influences and directs some – and sometimes all – of the outcomes of the mediation. The mediator may study relevant documents in order to understand the nature of the dispute, its substantive issues, and professional aspect, and suggest areas of agreement, solutions, and even compromise, urging the parties to accept a particular settlement.

Predicting the possible outcomes may pressure the parties to reach a decision as to their options; an evaluative mediator may help the parties, and sometimes even urge them to come up with options accordingly. Mediators may use their own creativity, and come up with suggestions, ideas, and offers of their own. Although they do not have any binding authority, evaluative mediators may use the authority conferred by their experience to propose solutions or compromises and direct the parties towards them.

#### THE TRANSFORMATIVE APPROACH

This approach in mediation is a process in which the mediator's role is to help and assist the parties to reach an agreement. The transformative approach to mediation, as described by Folger and Bush in *The Promise of Mediation* (1994), views conflict as an opportunity for solving problems through transformation. Folger and Bush believe that conflicts store the potential for valuable transformation in two aspects: empowerment of the parties, and recognition.

- *Empowerment.* The parties believe in themselves and their value. They believe that they have the ability and capability to identify and define their issues, and it is their responsibility to find a mutually acceptable solution to their problem.
- *Recognition.* The parties have the ability to understand the other party's point of view, and why they proposed the solution that they did (without necessarily agreeing to it). A transformative mediation has an educational value for the parties. By gaining the ability to reflect on the process, the parties may be able to use the same techniques in order to avoid future disagreements and disputes. The parties learn to use the opportunity of a conflict as an event from which both parties may benefit.

The potential effects of this approach may be valuable in the long run, both for the parties and for society. This approach provides and enhances moral growth and the ability to handle disputes in a cooperative way in the future.

The mediator may help the parties to identify and analyze their interests, and gain greater clarity about their goals, resources, options, and preferences. This will help them reach effective decisions, and develop a better and more efficient outcome.

A transformative/facilitative mediator leaves the responsibility with the parties. The mediator assumes that the parties are best placed to know what is right for them

and have the ability and good sense to reach the most suitable outcome regarding their situation.

The mediator would not be judgmental as to the parties' claims or positions, or choice of outcomes. The mediator would encourage the parties, and facilitate the process through which they will come up with creative proposals and options, as an outcome of their understanding of the situation. Transformative mediation empowers the parties by developing a sense of their own ability to deal with the issues and problems of the dispute.

The mediator knows that, if the roots of the conflict are to be understood, it is impossible to make short cuts; transformation and a true dialogue are what is aimed for, in the belief that this would lay the grounds for creative, freely-made, and constructive choices and solutions.

#### **4.8. Controversial Issues in Mediation**

The field continues to struggle with many controversial issues, including:

- The evaluative mediator versus the transformative mediator.
- The issue of "private caucus": should we have private caucus, or use only joint meetings with the parties?
- Is there a need for a mediator with special expertise in specific subject matters (banking, land, water, building industry, computers, and so on)?
- Should criminal cases and domestic violence be mediated?

What mediation is all about and how it should be handled are topics of contention and disagreements in the mediation community.

Dwight Golann (1996) addresses the issue of the purpose of mediation, and proposes that the primary function of the mediator is to resolve disputes, not to empower and transform the parties. Golann is not against empowerment and transformation of the disputants, but feels that the parties who are in court, or are about to go that route, concern themselves with the need of settling the dispute, not with transformation.

Professor L. Riskin (1996) looked at mediation from two systems on a continuum and created a grid, which illustrates the wide variety of problems, goals, techniques, and strategies that a mediator can employ in order to resolve a dispute (Figure 1).

#### **4.9. Psychological Issues**

The mediation process includes interactions of various kinds:

- between the parties and the mediators
- between the mediators (in co-mediation)
- between the mediators and the lawyers
- between the lawyers and the parties (their clients).

It is the mediator's role and duty to be aware of the emotional climate during the mediation, the barriers to the resolution, and ways and possibilities of overcoming these barriers.

Emotions can affect the judgment of the parties, and strong feeling can result in irrational decisions that are counterproductive and even harmful to the parties:

- The parties often show a distorted view of the situation.
- They are only willing to hear information that will support their view.
- They react in a negative way to any suggestion of the other side.

The mediator should identify these emotions and deal with them, not ignore them. The mediator has to be aware of these feelings, listen to what is said, identify the source of the emotions, acknowledge it, show empathy, and address these issues in a non-inflammatory way. He has to deal with irrational positions that result from strong emotions by helping the parties to analyze the results, and giving them time to change their perspective.

*Mediator's techniques evaluative*

Problem definition broad	<i>Evaluative Broad</i>	<i>Evaluative Narrow</i>	Problem definition narrow
	<p>Urges/pushes parties to accept broad (interest-based) settlement.</p> <p>Develops and proposes broad (interest-based) agreement.</p> <p>Predicts Impact (on interests) of not settling.</p> <p>Educates self about parties' interests.</p>	<p>Urges/pushes parties to accept narrow (position-based) settlement.</p> <p>Proposes narrow (position-based) agreement.</p> <p>Predicts court or other outcomes.</p> <p>Assesses strengths and weaknesses of each side's case.</p>	
Problem definition broad	<i>Facilitative Broad</i>	<i>Facilitative Narrow</i>	Problem definition narrow
	<p>Helps parties evaluate proposals.</p> <p>Helps parties develop and exchange broad (interest-based) proposals.</p> <p>Helps parties develop options that respond to interests.</p> <p>Helps parties understand interests.</p>	<p>Helps parties evaluate proposals.</p> <p>Helps parties develop and exchange narrow (position-based) proposals.</p> <p>Asks about consequences of not settling.</p> <p>Asks about likely court or other outcomes.</p> <p>Asks about strengths and weaknesses of each side's case.</p>	

*Figure 1.* The role of the mediator: evaluative and facilitative techniques

Source: Riskin (1996).

**4.10. Ethical Code, Issues, and Dilemmas**

The field of mediation, which is in the first phase of maturity, lacks a unified code of ethics (Hoffman, 1997). There is variability in standards and ethical standards because of the major differences in the various approaches to mediation, the goals, and processes used by many mediators. This causes difficulty in creating a unified ethical code that will suit the mediators and be accepted by all (Folger and Bush, 1994).

Many professional organizations have created their own code of ethics, and other organizations such as the Association for Conflict Resolution (ACR), American Arbitration Association (AAA), Center for Public Resources (CPR), and the American

Bar Association (ABA) adopted a similar ethical code. None of the codes of ethics of any organizations deals with issues of conflicting values and goals in mediation.

The code is problematic because it deals with standards and not with values; it is abstract and not always consistent with the various approaches, goals, and values of the mediators. Regardless of the approach or process used by the mediator, many of the mediators face similar ethical issues and agree that a mediator will not conduct a mediation if:

- One of the parties is mentally incompetent.
- There is a history of violence or abuse.
- The mediator is not neutral and impartial (for many reasons).

#### ETHICAL ISSUES

These concern what should be done in various circumstances:

- When the mediator cannot control his/her feelings towards one party.
- When the mediator breaches the confidence of one or two parties.
- When a party is uninformed or ignorant of its rights or relevant information.
- When a process does not improve but worsens the situation.
- When one of the parties asks the mediator for legal advice.
- When the mediator hears secrets that can cause harm to the other party.
- When a mediator finds that one party takes advantage and abuses the process for their own benefit.
- When the mediator hears lies and disinformation during mediation.
- When a solution that seems unfair is reached.
- When a solution is reached that seems illegal.

### **4.11. International Mediation**

Mediation plays an important role in international conflicts. Mediation, as defined by Bercovitch and Rubin, is:

A process of conflict management, related to but distinct from the parties' own efforts, where the disputing parties or their representatives seek the assistance, or accept an offer of help from an individual, group, state or organization to change or influence their perceptions or behavior, without resorting to physical force, or invoking the authority of the law.

(Bercovitch and Rubin, 1992)

As these authors point out, the mediator in international conflicts can be a private individual who is an international figure (President Carter), a religious personality (Archbishop Desmond Tutu), an academic scholar, a government representative (Henry Kissinger), a transnational organization (The UN), an international organization (The World Bank), or some other person or body, depending on the nature of the dispute.

In individual conflicts the mediator is an impartial neutral third party. In international conflicts the mediator is not always impartial, or neutral, and may have his/her own agenda, status, interests, resources, expertise, and power, which may be used during the process. The mediator becomes part of, and party to, the negotiation process.

#### **4.11.1. Mediation in International Water Conflicts**

In international and national water disputes, parties tend to be pragmatic and do not fight over who is right or wrong. The benefits of joint problem solving far surpass any

attempt to impose a unilateral outcome, because in most cases the parties need one another to reach a mutually agreeable solution.

Mediation in international conflicts is used when direct negotiation has failed, mediation is proposed by the court in The Hague, or the parties need and want to resolve the dispute and realize that they cannot do it on their own.

The mediator in international conflicts can use his/her power and resources to influence, threaten, and put pressure on the disputants, as when the World Bank used its power to help the parties reach a resolution.

The partition of water of the Indus River between India and Pakistan was the cause of a dispute in 1947, which could have led to war. In 1952, the World Bank acted as a mediator with power, and managed to influence the parties. India and Pakistan started negotiation over the allocation of water (Frederick, 1996).

In international negotiation when the parties are at a deadlock, a third party (a person, an organization, a panel) can act as a mediator. The mediator has to be acceptable to the parties, and facilitate the negotiation process.

In the Zambezi River dispute, where eleven countries are involved, they reached an agreement to manage and develop the Zambezi resources jointly. The Vatican played the mediator/facilitator and used its authority to influence the parties and promote an agreement (Milich and Varady, 1998).

In international water conflicts, the mediator will use the same tools and skills as in other situations. The mediator has to assess the conflict, identify the interests of the parties, identify other stakeholders (other countries, international organizations, and so on), and write and ratify the written agreement.

In environmental and water conflicts, which often involve more than two parties, it is crucial to suit the process to the conflict at hand (negotiation, mediation, public participation, facilitation, consensus building, or any combination thereof).

The public dispute over water issues in Hawaii was a long and escalating controversy that entailed issues such as protection and control of surface and groundwater, water ownership, and issues of water quality that even the lawmakers could not resolve. Councilwoman JoAnn Yukimura decided to mediate the dispute, all parties reached a resolution by consensus, and the result was a 75-page code proposal, and a state water agency managing a system of water use permits (Glaser, 1998).  
(<http://www.colorado.edu/conflict/peace/example>)

The Federal Government of the United States and the members of the New Mexico/Texas Water Commission, are parties to a mediation process that will deal with broad issues of quality and water planning. The process is confidential and does not constitute a consensus-building process because the environmentalists are not party to the process.  
(<http://www.us-mex.org/borderlines/www.us-mex.org/borderlines/>)

Mediation is among the processes (well-suited for two or more parties and multi-issues) involved in environmental and water conflicts: local, regional, or international. It is important that the parties in dispute over water enter the mediation process voluntarily, knowing that if they reach an agreement, they will be responsible for its implementation.

## **5. CONSENSUS BUILDING: PRINCIPLES, AND PROCEDURES**

“Consensus building” relates to a decision and agreement reached by all the identified parties who have a stake in the outcome and decision. Through this process, the stakeholders create new and more efficient options to resolve the issue at hand.

Special approaches to deal with emergency conditions such as floods, and droughts, will be developed to encourage cooperation, and avoid potential conflicts.

The consensus-building process is suitable for issues of planning, and environmental and social issues, among parties who will be affected by the decision.

Lake Victoria (shared by Kenya, Tanzania, and Uganda) suffers from environmental problems created by the introduction of the Nile Perch that have caused harm to the lake. The countries that share the lake joined forces to find solutions to preserve this important water resource, fisheries, and the environment (Klohn and Andjelic).  
(<http://www.fao.org/ag/AGL/AGLW/webpub/lakevic/LAKEVIC4.htm>)

Consensus building is a process that seeks a unanimous agreement over one or more disputed subjects. It is an effort to bring together groups who are stakeholders in an open controversy on a basic policy issue and priorities. It is an effort to arrive at decisions in which the interests (or part of them) of all the parties involved are met. All the interested parties have to participate on a voluntarily basis, be supportive of the process, and make it work.

The desire to reach a resolution to the dispute is an important starting point, an attitude vital for the progression of a process so complex. It manifests the willingness of all the participants to make efforts towards reaching a resolution, even though the parties know that at a later stage there may arise the need for some compromise. Parties who are interested or affected by the outcome should choose the representatives who will participate in the process.

### **5.1. Principles and Procedures**

The facilitator (or group of facilitators) of the process is a neutral third party who manages the process, conducting it in a way that will empower the parties and enable them to resolve the dispute at hand.

Some stages of a professional consensus-building process have to do with the organizational aspects of a complex process that involves many parties. The facilitator has to set a realistic schedule and deadlines, which are essential throughout the process. Each deadline should be focused and strive towards consensus.

The facilitator identifies all the relevant parties to the dispute, invites them, and ensures that they all will have input into the process. It is important that each of the parties that may be affected in any way by any possible future agreement or outcome will be represented throughout the process.

Bringing all the stakeholders together in order to make such an effort is a major part of the process, an attitude that brings new energies into a situation. The process is for a purpose, and people need a reason to participate in the process; the

knowledge that they will be heard and that their needs and interests will be met (at least partially) will cause them to commit to the process.

In 1969, Argentina, Bolivia, Brazil, Paraguay, and Uruguay reached an agreement, and signed the Plata Basin Treaty. This conflict concerned the Rio del Plata basin with its international and transnational rivers. The treaty did not consider the needs and desires of the local borderland communities and was not implemented because of their mistrust of, and objection to, the treaty. In 1999, it was recognized that in order to have an operational management of the basin it is of the outmost importance to involve the local public and authorities in these processes (CEPAL: Commission Economic Para America Latina Y el Carib). (<http://www.eciac.org>)

After all the parties have been identified, there is a need for an agreement between all the relevant parties to enter a process of consensus building. In order to ensure that all the parties involved gain confidence in the process, it is important to ensure that there are no stakeholders or interested parties missing.

Selection of a neutral third party (a person or a group of facilitators) to manage the process of consensus building is important. The neutral has to involve all the stakeholders, interview them, and formulate their main issues and interests.

The facilitator writes a draft describing the main issues of the conflict as understood by him/her from the interviews. The facilitator should also try and identify the second circle of stakeholders, those who do not have an immediate interest in the dispute but may contribute in a later stage in a positive or negative way, and may influence the process.

In establishing a draft to be handed to the participants prior to the first meeting, it is important that the interests should be general and not identified with a particular party. The draft should be an analysis of the interests as they relate to a specific category or issue. This allows the parties to view the issues, and avoid dealing with them on a personal level.

The facilitator should help the parties to design a flexible process, one that will meet their special needs and circumstances, and enable changes to be incorporated into the process. The process should allow for diverse values, interests, and needs, and be one in which the parties will show acceptance and respect for this diversity.

By getting responses and objections from the parties, the facilitator may evaluate whether entering a process of consensus building is right at that stage. If the objections are not too severe, she/he/they should use the responses in order to reframe the issues and present them at the first meeting in a neutral manner, acceptable to all parties.

If there are many parties involved, each group should choose a representative for the process. It is important that the representatives be acceptable to all the parties involved, have the confidence of their groups, and are empowered to make decisions on behalf of that group at a latter stage.

The facilitator(s) should ensure that all parties have equal access to relevant information, equal access to relevant experts, and resources to enable them to participate.

The facilitator(s) should help the parties to develop strategies and proposals to assist them in resolving their differences. They have to research techniques that were used by others facing similar challenges, and mediate and reach resolutions to as many issues as possible. The team can create an advisory group or a consultation process to assist in exploring and developing options and creative solutions to address the needs of the parties.

The group can decide to hold public meetings, or use other ways to provide information about the process to the public at large. In a consensus-building process, some of the meetings may be open to the public while others may not. Regulations for the participation of the public should be formulated.

The representatives are accountable to their public and constituencies, and should make sure that they represent their needs and interests and provide them with information on a regular basis.

When there are more than two stakeholders involved, a committee is needed that would be responsible for taking logistic decisions throughout the process. A representative of each group of the stakeholders should take part in such committee.

An agenda and a timetable should be decided upon, allowing time for complex issues to be reviewed properly. A few more ground rules should be formulated:

- the responsibilities of each of the parties
- behavioral regulations
- procedures of decision making
- methods of dealing with disagreements as the process progresses.

In conducting a consensus-building discussion, it is the facilitator's role to create the terms for a constructive discussion to take place. It is his/her role to establish the norms of active listening, to help the parties create trust, and to educate the parties to use collaborative negotiation skills.

Setting the norms of collaborative negotiation and transparency in the group will enable the generation of creative ideas.

Revealing the interests of all, respecting the interests and needs of the other participants, may lead to mutual gain, and make the process a beneficial one.

In the case of a new reservoir in San Antonio, Texas, a common decision was reached only through the process of consensus building. The purpose of the proposed new reservoir was to augment water supply to the city of San Antonio. A first proposal was not implemented, due to objections by some of the affected stakeholders. When the process was stalled, and no progress could be made, it was concluded that the only way to proceed was through consensus building. All the stakeholders – real estate developers, environmentalists, the armed forces (who had five bases in the area), the Chamber of Commerce, neighborhood groups, civic leaders, and anti-reservoir activists – participated in the process. The meetings were open to the public, and every party was heard. By the end of the process it was clear that the city of San Antonio had no need for a new reservoir, provided it improved the management of the existing one. A policy to manage the existing reservoir was established (Eckhardt, 2001; Liebow, 1999).

It is also important that each of the parties will be allowed as much time as necessary to reach their decisions, and that the group is not allowed to apply pressure that may lead to a decision being taken that some may regret.

In some cases, there is a need to establish subcommittees to deal with specific issues that need to be investigated by a specific expert, while the group continues with the overall process.

Subcommittees may also be formed in order to formulate initial drafts for future agreement on issues where consensus has been reached. As the process progresses, it is important that one approved draft is initiated, which will be at the center of final discussions over negotiated issues in order to make sure that all the participants had thought them over.

All participants should be committed to implementing the agreement and creating a mechanism of effective monitoring to deal with problem that may arise in the near and distant future. While reaching final decisions, it is important to ensure that each of the participants can “live with” the proposed agreement and that it can be “sold” to their constituencies.

In forming a consensual agreement, the goal is to reach an agreement that all the parties think the most satisfactory, but over 90 percent approval may be considered a very successful consensus-building process. In order for a consensus to be reached and accepted, 80 percent of the participants or stakeholders should agree on the outcomes. Less than 80 percent approval of the agreement is no longer considered a consensual agreement and is a majority decision.

Before signing the agreement, it is important to make last-minute efforts to settle issues that parties cannot live with and that therefore mean that they object to the agreement. They should be allowed to raise new ideas that may be accepted by those who approved the agreement. In many cases the outcome of a consensus-building process may be a line of recommendations to be approved.

In such cases, it is important to include a clear and detailed description of the steps that need to be taken (by whom) in order to make sure that the formal agreement will be adopted, or at least taken into consideration by those who are about to make the decisions.

The Umatilla Basin conflict was going strong for years, and it took more than two decades to adjudicate it.

The conflict was resolved peacefully, cooperatively, and inexpensively. The solution was a project that was the result of a mutually agreed consensual decision by all the parties: the Confederated Tribes of the Umatilla Indian Reservation, the irrigators, the Bureau of Reclamation, the Bonneville Power Administration, and the Oregon Department of Fish and Wildlife. The water exchange delivers water from the Columbia River to the irrigators, who in exchange leave water in the Umatilla River for flow needed for the salmon migration periods. A large portion of the McKay Reservoir is added to inflow augmentation use. The first project demonstrated to the parties the advantages of joint problem solving, which resulted in another project. The Umatilla tribes and the city of Pendleton developed a joint water supply project, which will give the city a secure water supply, and address the water needs of the tribes on the reservation. (<http://www.umatilla.nsn.us/basin.html>)

## **6. CONCLUSION**

Water is one of the most basic and essential needs of people, the species that share life on earth with humanity, and the environment. Quantity, quality, and many users with diverse interests create competition over this limited resource. Competition may be the root cause for potential conflicts, in the local, national, and international arenas.

Water problems involve diverse issues, including: food production and health of populations, quality of the environment, power production, navigation on rivers, and fisheries – all issues that determine the fate of this and future generations.

The most effective way to manage this resource in a sustainable fashion is for all the stakeholders of a common water resource to cooperate in jointly managing, protecting, and developing it.

Stakeholders should agree and put in place mechanisms and modalities for resolving water disputes if and when they arise.

This underlying philosophy creates a challenge (for water resources managers, governments, local and international NGOs, and national and international institutions) to seek ways of avoiding conflicts if possible, and resolving them amicably and effectively when they do arise. In order to accomplish this, there is a need to raise the capacity of these organizations so that they can better prepare for, and respond to, challenges that arise because of constantly changing circumstances. This capacity is especially critical in areas where there is potential conflict brewing.

Capacity building involves training those involved in the skills of negotiation, teaching the value of mediation and other forms of facilitated negotiation, training of trainers and facilitators, and development of replicable techniques and materials to support others in learning and using these techniques. It also requires assistance in creating strategies and organizational structures to support novel negotiation, conflict management, and prevention skills.

If there is goodwill, a desire to avoid confrontation and dispute, and an understanding that all parties can benefit from a strategy of using alternative dispute resolution approaches, there is a real opportunity to reduce the damage caused by conflicts and move from potential conflict to potential cooperation.

## **7. ADR BASICS: DEFINITIONS**

ADR

Alternative dispute resolution/appropriate dispute resolution: alternative or appropriate methods and processes to prevent and resolve conflicts and disputes.

CONFLICT

The *Oxford Dictionary* defines "conflict" as:

1. An encounter with arms.
2. A fight.
3. Conflict of interests.
4. To be incompatible.

*Webster's Dictionary* has a broader definition:

1. Antagonism or opposition as between interests, or principles.
2. A conflict of opinion.
3. Discord of action, feeling, or effect.
4. Incompatibility or interference, as of one idea, event, or activity with another.

Rubin et al. in *Social Conflict* (1986) define "conflict" as meaning: "perceived divergence of interests, or a belief, that the parties' current aspirations cannot be achieved simultaneously." Folberg and Taylor in *Mediation: A Comprehensive Guide to Resolving Conflict Without Litigation* (1984) state that: "a conflict may not become a dispute if it is not communicated to someone in the form of a perceived incompatibility or a contested claim."

ADJUDICATION

Adjudication is the process by which a conflict is presented to a judge, or a third party appointed by the judge (a panel of judges, a jury, and so on) for a legal decision that is binding and enforceable. Adjudication is the traditional way of resolving disputes by rendering a decision. The decision is made according to legal precedent and

application of relevant laws, which requires that the issues in the dispute be narrowly focused. The judge or jury as a third party imposes the solution upon the parties in the dispute. This is the process most known in societies all over the world, where the court appoints a judge who has the power to decide. The parties to the dispute employ lawyers who present their clients' arguments and evidence, and the judge rules and imposes his solution to the dispute. The parties to the dispute do not have control over the content or the process, and the result is usually a "win-lose" situation.

#### ARBITRATION

This is a process wherein parties to the dispute agree to submit their dispute to a neutral party, who will decide their case.

Arbitration is the closest form to adjudication. The parties agree on a third neutral party or a panel, to whom they will present their case. The arbitrator has the power of decision in the dispute. It is a private and less formal process than litigation in court. There are several varieties of arbitration; it may be binding or non-binding, and the arbitrator's decision may be with or without a written explanation or opinion. The arbitrator meets with the parties to a dispute, hears presentations from each side, and renders a decision.

The arbitrator may be a professional, familiar and knowledgeable in the issues involved (an accountant, an engineer, and so on).

The arbitrator will hear the facts and arguments of each side, and render a decision in light of the relevant laws and procedures.

The parties have the freedom to choose the arbitrator who will deal with their dispute.

This process is very often faster and less formal than the judicial process. The results may be binding or non-binding (depending on a prior decision and local laws) and, when binding, often do not allow appeal to a higher court. Some states in the United States have special programs of "Court Annexed Arbitration," but this process is often not binding and the parties can ask for a trial. Arbitration hearings can be formal but the rules of evidence used in courts do not usually apply.

#### CONCILIATION

Conciliation is a process in which a third party brings together all sides of the conflict for discussion among themselves.

Conciliators do not usually take an active role in resolving the dispute, but may help with agenda setting, record keeping, and other administrative concerns. A conciliator may act as a go-between when parties do not meet directly, and act as a moderator when joint meetings are held.

#### FACILITATION

A third party offering his/her "good offices" in order to bring the parties together and encourages them to continue their negotiation.

A third party will assist the parties to continue the negotiation, reach consensus and move towards an agreement. The third party should be an "honest broker" who offers "good offices" in order to bring the parties together. The third party does not get involved in the issues of the dispute, only in the process.

#### NEGOTIATION

The *Oxford Dictionary* defines negotiation and indicates its earliest known occurrence as: Negotiation – oci – 1579.

1. A business transaction – 1662.
2. Trading traffic – 1669.

3. A course of treaty with another (or others) to bring about some results, especially in affairs of states – 1579.
4. The action of getting over or round some obstacle by skillful maneuvering – 1885.
5. Two or more parties try to reach an agreement by discussing the issue or issues.

*Webster's Dictionary* defines negotiation as "mutual decision and arrangement of the terms of a transaction or agreement."

Fisher et al., in *Getting to Yes* (1991), define negotiation as: "a basic means of getting what you want from others. It is back and forth communication designed to reach an agreement when you and the other side have some interests that are shared and others that are opposed."

Goldberg et al., in *Dispute Resolution* (1992), define negotiation as: "communication for the purpose of persuasion."

There are many more ways of defining negotiation, but the last definition is a very broad one and is wide in scope: "two or more parties communicate for the purpose of influencing the other's decision."

In negotiation, the parties agree to discuss and try to reach an agreement among themselves, or through their representatives. The parties have control of the process and the outcome. They try to find solutions that will satisfy the most interests of the parties. The negotiation process can also be a process of joint problem solving, on a disputed or potentially disputed issue.

#### MEDIATION

Mediation is a process in which an impartial third party encourages and facilitates in an informal way the negotiation between the parties to the dispute. The mediator does not have the power to impose a solution on the parties. The mediator has control over the process, but the decision and outcome are in control of the parties.

The *Oxford Dictionary* defines mediation as "to intervene for the purpose of reconciling." *Webster's Dictionary* defines mediation as:

1. To settle a dispute as an intermediary.
2. To act between parties to effect an agreement.
3. The act or process of mediating between parties so as to effect an agreement or reconciliation.

#### MIXED PROCESSES

In mediation-arbitration (Med-Arb), the parties agree in advance to start the mediation process, and if the dispute is not resolved through mediation they will continue with the process of arbitration (usually a binding arbitration). The parties decide before the mediation process begins who the arbitrator will be (sometimes it is the mediator, and sometimes it is a new neutral party).

#### EARLY NEUTRAL EVALUATION (ENE)

This process involves an assessment of the case by an experienced lawyer or a retired judge in the area of the dispute. An objective analysis and assessment of the strengths and weaknesses of the case are given to the parties. The neutral may tell the parties her/his prediction on the outcome of their case if they decide to go to trial. This process is a combination of mediation and non-binding arbitration. The neutral experienced evaluator will help the parties to identify points of agreements, and hopefully encourage them to reach a settlement. In some cases, a neutral expert is asked jointly by the parties to decide on technical matters or issues.

## CONSENSUS BUILDING

A process during which all parties that have a stake in the outcome and decision reach an agreement.

## STAKEHOLDERS

Any party who can affect or be affected by the decision or the outcome of the conflict.

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## Constitution of UNESCO (excerpt)

London, 16 November 1945

The Governments of the States Parties to this Constitution on behalf of their peoples declare:

That since wars begin in the minds of men, it is in the minds of men that the defences of peace must be constructed;

That ignorance of each other's ways and lives has been a common cause, throughout the history of mankind, of that suspicion and mistrust between the peoples of the world through which their differences have all too often broken into war;

That the great and terrible war which has now ended was a war made possible by the denial of the democratic principles of the dignity, equality and mutual respect of men, and by the propagation, in their place, through ignorance and prejudice, of the doctrine of the inequality of men and races;

That the wide diffusion of culture, and the education of humanity for justice and liberty and peace are indispensable to the dignity of man and constitute a sacred duty which all the nations must fulfil in a spirit of mutual assistance and concern;

That a peace based exclusively upon the political and economic arrangements of governments would not be a peace which could secure the unanimous, lasting and sincere support of the peoples of the world, and that the peace must therefore be founded, if it is not to fall, upon the intellectual and moral solidarity of mankind...

