

Mediation-fostered Equality? An Examination of Environmental Negotiations from a Power/process Perspective

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ABSTRACT

This paper seeks to separate in theory and practice, structural and functional characteristics of various environmental mediation approaches. These approaches can be grouped into two basic model types that I call *outcome-driven* and *process-oriented*. I argue that if mediation is outcome-driven rather than process-oriented, factors associated with power disparity will negatively influence the achievement of equal footing in the process. Two cases of environmental negotiations featuring mediation processes are examined from a power/process perspective, demonstrating difficulties that can arise from the reality that some stakeholders are 'more equal' than others. The formats of negotiation are explored to contrast and compare strategies employed, and suggestions are made as to the relevance of outcome-driven and process-oriented mediation approaches to varying types of conflicts.

KEY WORDS: Environmental negotiation, mediation, conflict resolution, natural resources management

Igualdad Conducido por Mediación? Un Análisis de Negociaciones Medio Ambientalistas

Dentro del contexto del manejo del medio ambiente, el termino "mediación" ha sido aplicado a muchas estrategias de intervención que intentan resolver las disputas de los partidos. Esta investigación repasa los estudios sobre la mediación y diferencia entre las estrategias que pueden promo ver un balance los partidos y las que no pueden. Dos perspectivas basicas de mediación están identificadas:

- i) Las orientadas a resultados y
- ii) Orientadas al proceso.

Para ilustrar la aplicación de estas perspectivas, tres casos de negociaciones ambientales se discuten desde una perspectiva de poder/proceso. Estos casos demuestran las dificultades que surgen de la realidad de que algunos partidos son "mas equitativos" que otros. Los formatos de negociación son explorados para contrastar y comparar las estrategias de mediación aplicadas, y se han hecho sugerencias con respecto a la relevancia que tienen las perspectivas *orientadas a los resultados* y *a las orientadas a procesos* en las varios tipos de conflictos.

PALABRAS CLAVES: Mediación, estrategias de intervención, negociaciones ambientales

ON ENVIRONMENTAL MEDIATION

Mediation might be described as the process that seeks to foster equal footing for stakeholders. It is a process that recognizes the power disparities that place the investments of interested parties at risk. While the term 'mediation' is sometimes used interchangeably with 'negotiation', there is a significant difference. Negotiations can occur between two parties, but mediation essentially provides for the insertion of an intermediary between disputing parties. Mediations can take many forms – from large and complex tribunals to much simpler facilitated discussions; from formalized mediation procedures, to informal mediation processes. Of importance here, are the differences found in mediation practices. These differences stem from varied approaches to power disparities that occur in and result from social transactions.

There are any number of external characteristics that inform mediation, from culture, history, language, politics and law, to more interpersonal criteria based on individual personality, power, and status of both mediator and disputants. These characteristics, informing individual worldviews, can be loosely grouped into two descriptive areas: *nature* and *scope*. Cultural characteristics, family and community traditions, history, values, ethics and beliefs, language and semantics are examples of attributes that fall into the descriptive area of *nature*. The role of each mediation participant, the type of mediation (i.e. negotiating, integrative, collaborative, consensus building), the duration of the mediation process, number of participants, complexity of issues and legality are some attributes that describe *scope*. The nature and scope of the interaction within the triad of mediator and disputants inform the mediation process.

Although mediation is often thought synonymous with notions of achieving equal footing between unevenly advantaged stakeholders, there is disagreement as to whether equal footing is a necessary requirement of conflict resolution (Moore 1996). Many authors see an advantage to the dynamics of mediation where imbalance promotes shifts from positions to interests. The interest-based 'Best Alternative To Negotiated Agreement' (BATNA) approach (Fisher and Ury 1981) suggests that shifts in outcome perceptions can transform adversarial negotiations to collaborative efforts. Glasbergen (1995) views this transformation process as an interactive 'controlled change' producing what Gray (1989) conceptualizes as an evolving negotiated order. These shifts in perception are inherently related to outcome possibilities and the relative cultural capital (or power) associated with achieving them. The notion of transitioning from adversarial to collaborative negotiations maintains the framework of winners and losers, but shifts the focus onto 'win-win' outcomes.

Others wishing to move away from the adversarial perspective promote the efficacy of balance in stakeholder groups (Innes and Neumann 1994), and see the benefit of a dialogue approach or "a conversation among peers" (Issacs 1999) which assumes equal footing. Also focusing on equal footing is the Susskind, Levy and Thomas-Larmer (2000) mutual gains approach where professional negotiators are hired for the express purpose of overcoming stakeholder disparity. Where

negotiators and disputants have the common goal of collaboration, the concept of equal footing can be actualized. But as Touval and Zartman (1985) point out, disputants can also use professional negotiators in political maneuvering. Mediator bias and clout can augment the power disparity that will exacerbate the zero sum game.

The role played by the mediator, as well as the nature and scope of the mediation process are critically important to whether adversarial or collaborative methods are adopted in the mediation process. Moore (1996) specifies three types of mediators:

- i) *Social Network Mediators* — who have an established trust relationship with the disputants;
- ii) *Independent Mediators* — who are chosen on the basis of their neutrality to the disputants; and lastly,
- ii) *Authoritative Mediators* — who are sought precisely because of their ability to settle a dispute through influence, authority and/or a vested interest bias.

Touval and Zartman, (1985) provide parallel descriptions of mediator roles: *communicator, formulator, manipulator*. There is some difficulty in presenting the mediation process in such concise packaging, precisely because it is a process – a changing and sometimes less than neat dynamic. We can however, explore some broad approaches to conflict resolution within the applied context of mediation.

Fisher and Ury (1981) distinguish between two strategies that define the relative perspectives of the disputants, as well as contribute to the nature and scope of the mediation process, namely, *position-based* or *interest-based*. Position-based strategies often feature obvious displays of power. The status of a lawyer as a 'heavy hitter' can be translated into power capital, useful in gaining negotiative advantage. Experts can be used in this manner as well, and those participants able to produce 'expert' evidence position themselves more strongly in an arena where a zero sum game is being played. With the position-based strategy, both sides have the expectation of winning, and both sides compete for a power advantage, sometimes by building their own power capital (legitimacy, credibility, and legal stance), and/or by undermining the power capital of the opponent. Because a *position* reflects perceptions of its utility for accomplishing benefit or gain, individual investment into the position will similarly relate to cost-benefit. Thus, a functional and inflexible relationship exists between individual investment and position – either the investment pays off, or it does not.

Interest-based strategies focus on the affective investment participants have in a variety of interests related to issues of contention. Here, co-operation is enhanced and there is an expectation on both sides of compromise. Overt displays of power provide little tactical advantage, so power is expressed in subtler currencies. For instance, one party might provide information that affects the other party's interests, thereby *educating* the other party. This tactic is often used by natural resources agencies in negotiating with stakeholder groups. Another is a tactic offered by Fisher and Ury, in which one party 'attacks the problem' while offering recognition

and support to the other party. This creates a dissonance in the other party, encouraging them to move away from the problem toward the comfort of solution. Thus, one party has precipitated a cognitive shift in the other party affecting their interests and resolve.

Figure 1 illustrates some characteristics generally associated with the two strategies, but it in no way infers exclusivity of characteristics between the two. In fact, Fisher and Ury specifically show the linkage in their description of 'hard and soft' positional bargaining. Their 'principled negotiation' model extracts characteristics of hard and soft negotiations useful in 'changing the game' to a hybrid focused on interests and solutions.

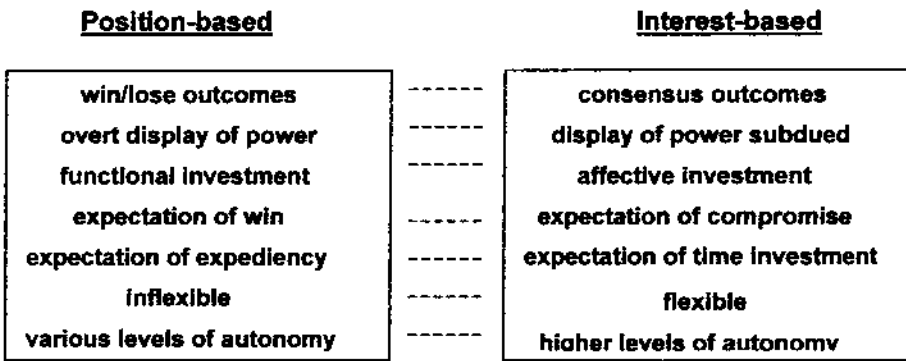


Figure 1. Some characteristics of position-based and interest-based strategies. Broken lines represent the continuum of degree along which these characteristics occur.

Fisher and Ury promote an interest-based strategy as the preferred strategy as it opens up more options for negotiation. But while disputants appear (or are led) to adopt one strategy over another, the nature and scope of the process cannot usually be so distinctly categorized as being one strategy or another. The mediation process might travel back and forth from position-based to interest-based negotiations, or start out as a win-lose situation and be modified by a skilled mediator and willing/able disputants, into an interest-based process.

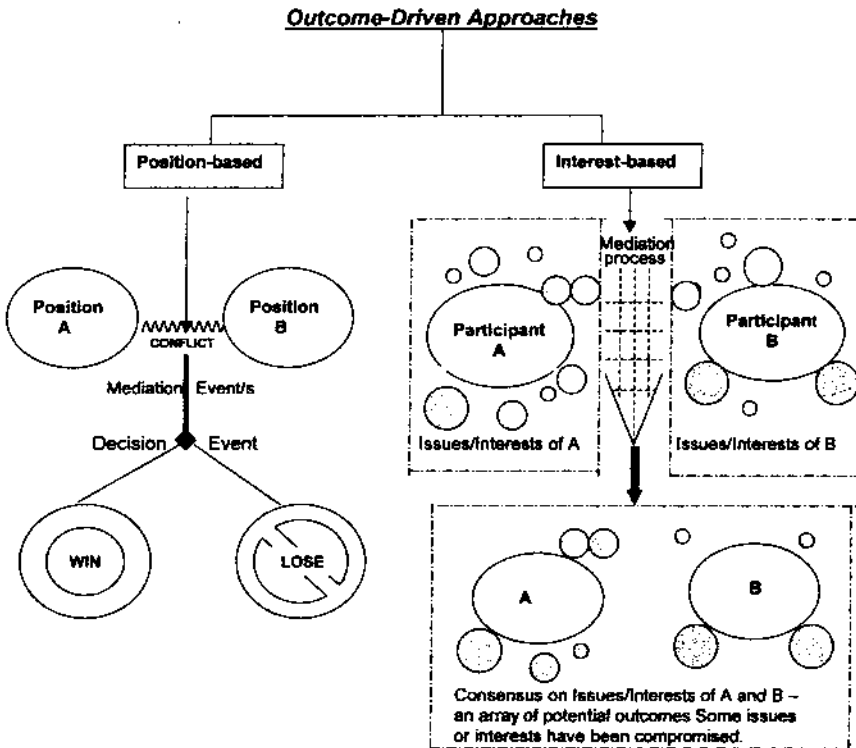
Thinking within a comparative framework of interest-based and position-based strategies is useful in conceptualizing the multifarious nature and scope of mediation processes, and the often complex interplay within and between them. The use of one strategy over another by participants can be a descriptor of the relative types of investment that various stakeholders might represent in a given mediation. Strategy preference can indicate the various levels of autonomy in decision-making that mediation participants have or perceive themselves to have. As well, strategy preference can reveal expectations (i.e. of their role in the process, of outcome, of time expenditure), and relative individual expectation levels held by participants. In

a position-based strategy, there is a focus on the outcome, and so we can say that the mediation is *outcome-driven*. Here, the strategy is to incorporate displays of power to drive the adversarial process to victory for one side and loss for the other.

Interest-based strategies are less clear. Even when an interest-based strategy is used in conjunction with consensus building methods, the focus may be *outcome-driven*, and not always overtly so. The focus on interests in the 'principled negotiations' method, is "...explicitly designed to produce wise outcomes efficiently and amicably" (Ibid.:10). Environmental negotiations incorporating mediation tactics provide some good examples in the use of overt and covert power strategies, many of which also use the semantics of interest-based consensus. Susskind, Levy and Thomas-Larmer (2000) examine a series of negotiated agreement and mediation cases which employ various power strategies and BATNA's to orchestrate interest-based agreements. In a similar vein, Innes, Gruber, Neuman and Thompson (1994) see BATNA as the first step in consensus building – a cost/benefit analysis of interests to determine compromise.

The deliberation of and shifting to 'best alternative to negotiated agreement' (BATNA) immediately recognizes the forfeiture of something substantive, and seeks a consensual settlement that allows stakeholders to adjust the boundaries within which they will maximize benefit and minimize cost in a situation. But while reaching consensual agreement, it is not correct to suggest that participants' eyes are not on 'best and worst case' outcomes. As in the use of BATNA, it is from these that the area between is negotiated. From this adjustment, outcome possibilities are expanded to reflect interests and ensuing deliberations will progressively narrow the area in which negotiation occurs until agreement is reached (see Figure 2). In achieving consensus based on interests, parties have avoided a zero sum confrontation. This has obvious advantages in disputes between stakeholders with on-going and/or localized relationships, in disputes with multiple stakeholders, or in court-mandated mediations where potential losses could be substantial. In many situations then, *outcome-driven* mediation, whether position-based or interest-based, provides satisfactory settlement. In others, however, it is less than satisfactory, resulting perhaps in deferred confrontations, increasingly convoluted issues, definitional uncertainties, and untenable agreements to name only a few possibilities¹.

Aside from some apparent difficulties with post-mediation realizations by stakeholders of having lost something in compromise, or outcomes of agreement that are either untenable in their idealism or so shallow as to be meaningless, there are situations in which an *outcome-driven* approach is deeply disquieting and less than appropriate in finding long term solution. Touval and Zartman (1985) provide case studies on U.S. peacemaking mediations, several years in the process and only nominally successful. In the cases studied, the US (acting as mediator) sought to induce, compel or persuade foreign parties of longstanding religious and political conflict to translate these into interests and negotiate a peaceful middle ground.



Outcome-driven approaches include position-based strategy and interest-based strategy. Position-based strategy: simple representation – two positions; mediation interface; zero Sum outcome. Interest-based strategy: A has multiple interests as does B. Relative import of interests/issues indicated by size of sphere. Relative attachment (heavy investment) of interest/issue indicated by proximity to A or B. Interests that are negotiated into consensual outcome are shaded. Interests that are compromised are represented by empty sphere. This is done through the mediation process. In order to 'win' on some issues, others have to be compromised. The outcome is what A&B can consensually negotiate.

Figure 2. Outcome-driven approach to position-based and interest-based strategies.

Some obvious questions arise. Can tradition, culture, and religious belief be reduced to negotiable interests? Burton (1990, 1996) and Moore (1996) suggest they cannot.

In related area, Frédéric (in Deudney and Matthew 1999)² discusses environmental security issues and conflicts on a global scale, noting that even when consensus has been reached through a mediation body or program (such as the Food and Agricultural Organization of the United Nations [FAO], United Nations Environmental Program [UNEP], or the Organization of Economic Cooperation and Development [OECD]), the agreements reached cannot be enforced because the mediating organizations or programs have no legal teeth to compel compliance. Certainly, one purpose of mediation is to facilitate negotiation of agreements. Where agreements are recognized by law, and where there is legitimated authority to compel compliance, the legitimated authority or authorized agent will subsequently act as police. But here again, questions arise. Should organizations founded on the notion of international cooperation (such as FAO, UNEP or OECD) be thinking of broadening their role so as to be able to enforce agreements between nations? Frédéric acknowledges that nations are primarily concerned with their own economic and environmental security.

"... (I)t is through the prism of their own national security and hence their own national interest, that states will analyze the impact of global environmental problems along with state behavior apt to upgrade the situation or further harm it" (Ibid.:96).

Is it realistic to think that "beefed up" mandates toward "real powers of intervention" will accomplish anything save further conflict?

These examples point to a fundamental difficulty in the mediation process, particularly although not exclusively those associated with global participants – that of the pervasiveness of essentialist thinking. This is perhaps because mediation models offered by authorities or negotiators often make only superficial attempts at accounting for and comprehending the multifarious nature and depth of meaning attached to 'issues' by diverse stakeholders. In other words, mediations involving diverse identity groups (i.e. race, class, ethnicity, culture, language, politics, nationality, religion, tradition) often mistakenly engage in *translating* these characteristics and associated attributes (i.e. identity definitions, norms, needs, interests) by using 'mainstream' standards and definitions foreign to the actual groups in conflict. This is done on behalf and purportedly 'in the best interests' of the conflicting groups. More reasonably, it is to facilitate the application of the mediation model and the participation of the negotiators along ideological lines that inform those 'guiding' the process toward specific resolution outcomes. Meanwhile, the recognition of basic human needs common to groups in conflict and on which durable resolution might be built, escapes the process.

Fisher (1997), moving away from the 'how to' efficiencies of *Getting to the Yes* (1981), notes in this more recent work the importance of the distinction made by

Burton³ between “‘deep-rooted conflict’...not based on negotiable interests and positions, but on underlying needs that cannot be compromised” and “‘disputes’ about tangible, negotiable interests...”. Differences of principle, ethic, nationalism, religion, and cultural meaning are examples of ‘deep-rooted conflict’. Fisher suggests that these ‘deep-rooted’ conflicts can be accommodated by an innovative mediation technique called *integrative conflict resolution*.

“Thus ICR...can potentially provide some integration between the often conflicting major strategies of peace through strength and peace through cooperation. This potential is because ICR accepts the importance of power in influencing relationships, appeals to standards of fairness and justice as espoused by international law and world order models, and assumes that a firm and cooperative approach to conflict management will lead to satisfactory outcomes for all parties.” (Fisher 1997)

Not unlike Glasbergen’s (1995) ‘network management’ scheme, ICR emphasizes the process of working through conflicts using a variety of methods. Yet, there is still the focus on ‘satisfactory outcomes’ from a ‘firm and cooperative approach’ that is somewhat troubling. Fisher describes ICR as having a secondary role to that of more “substantive negotiations”. ICR is “de-escalatory” – useful in diffusing emotional displays in preparation for more subtle power strategies. Fisher’s perspective on what is substantive does not appear to entirely grasp the point Burton makes. ‘Deep-rooted’ conflicts are deeply substantive.

Resolution of some environmental conflicts will require the establishment of collaborative trust and the security of building toward an array of equally met needs – substantive needs. Is it possible for collaborative trust to be equally exchanged if stakeholders are not or do not perceive themselves to be on equal footing? Not likely. Disparate conditions between stakeholders (in access to resources, political associations, level of investment, size of organization, coherency of claims – in other words, their relative power assets) filter into and influence the process despite an interest-based orientation. ICR as Fisher describes it, is not meant to equalize power – it is meant to diffuse the emotions of those who perceive themselves compromised. Burton (1996), however, claims that “(e)motional reactions must be expected and respected, but not avoided.” The concept of integration is a good one, and Fisher notes its potential in a preventative role “...in a less chaotic future world”. I would suggest however, that it is only through a process of integration focused on common human needs and away from power differentials that a less chaotic future world might be possible.

With increasing attention in public policy toward social justice and access issues, there is an accompanying focus on ‘the process’ – oftentimes as a hurdle to negotiate in order to get on with the business at hand of meeting administrative and legislative mandates. In some quarters, the mediation process is viewed opportunistically as a power game (Glasbergen 1995, Fisher and Ury 1981, Fisher 1997). Viewed as a means to an end, process is constrained to a conceptually legalistic, structurally fixed

format. In many mediation situations, this is entirely sufficient. But in 'deep-rooted' conflicts involving societal needs that cannot be compromised, attempts by mediation to coerce or influence outcomes, or to 'go through the motions' may be far more damaging in the long run. "Indeed, it may well be that conflicts are protracted unnecessarily just because inalienable values are translated into interests merely to fit into the traditional processes of bargaining and negotiation" (Burton 1987).

To view process exclusively as a means negates the phenomenon of process being a means and an end to itself. Process as an end infers a product – something additive and innovative. Thomas' (1994) 'power process perspective' addresses the additive nature of innovation as both the process and product (means and end) of an interactive dynamic between technological and social worlds. Following after Granovetter's (1985) idea of the 'embeddedness' of transactional behaviors in the social realm, Thomas emphasizes the 'mediating role of history, structure, and power relations', but moves beyond 'embeddedness' by alluding to the influence of change itself as additive and unpredictable. Similarly Bolan, in Bryson and Einsweiler (1991), recognizes the emergence of something new and additive. In differentiating between instrumental rationality (utility) and substantive rationality (normative), he suggests there is a third form, 'adaptive rationality', that mediates between instrumental and substantive rationalities. Adaptive rationality has a 'synthesizing' nature that "...adds the dimensions of creating new meanings and new thrusts of achievement through a communicative process that concentrates on understanding the existential interstices of shared power..." (142). It is in the recognition of a pathway between instrumental and substantive rationalities that the mediation process has the potential to synthesize a new knowledge grounded on shared experience and power.

If mediation is to make permanent progress toward resolving long-standing, deep and sometimes violent conflicts, then we must refocus our endeavors on the larger and deeper issues toward the kind of integration that *learns through the process*, and away from the short-term efficacy of outcome-driven models in mediated interventions. In conflicts over deeper issues, more than a temporary fix or a cursory effort at 'process' is required. In the process phenomenon, the dynamic of interaction is an end valuable in its own experience and creation, for it is through the shared experience of the process that we grasp the full import of our interdependence and learn from it. It is not the case of 'getting into each others' mindset' but rather the recognition of basic societal needs universally held. It is this recognition that effectively empowers parties in conflict to move beyond interests and work together toward durable solutions by providing for their own and others' needs. Differences in religion, culture, ideology, tradition, and nationalism viewed as integral to traditionally defined conflict, and problematic to outcome-driven styles of mediation, are accepted and respected as components of learning in what I call the *process-oriented approach model*.

In the *process-oriented model*, the additive potential of this integrative dynamic is nurtured. As depicted in Figure 3, the focus of mediation is on the shared learning

experience and the creation of new meanings and the development of understanding that transcends differences. In this model, outcome is secondary to the process and because of this, specific outcomes cannot influence the process. The power factor inherent to outcome-driven strategies, does not vanish in the process-oriented model. Rather, the effect of power disparity is neutralized by making this irrelevant to the process. The role of the mediator is critical in ensuring that coercive power is diffused, and a place of safe harbor is built so that 'deep-rooted' issues can be revealed in *dialogue*. With coercive power neutralized, participants may enter into the process of dialogue on equal footing. Through dialogue, the practice of listening, respecting, comprehending, expressing and collaborating facilitate equal empowerment of each participant. Isaacs describes dialogue as "...a conversation among peers" (1999). He notes that an emergent worldview promoting dialogue balances the languages of power (action and efficiency), affect (belief and feeling), and meaning (the spirit of truth). Without a balance of these, he says, there are corrupt, tyrannical and over- emotive consequences. Isaacs suggests that developing the capacity for dialogue is necessary for overcoming profound worldview differences.

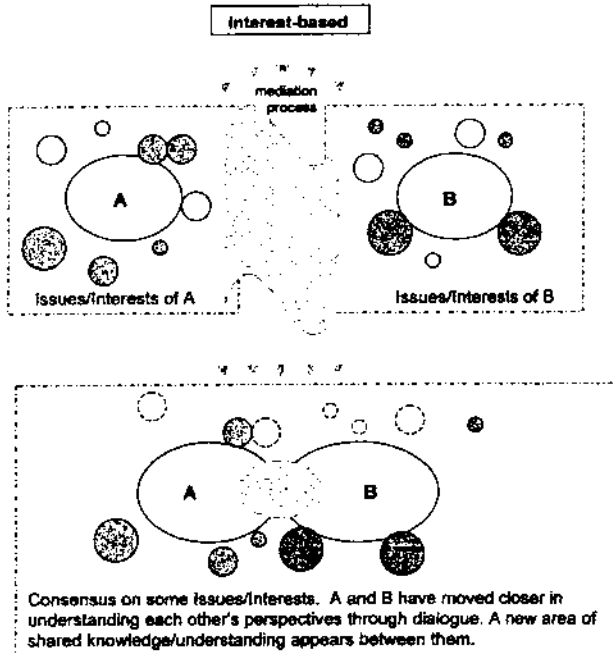
In situations of 'deep rooted' conflict, it is not sufficient to pay lip service to the semantics of dialogue while maintaining the structural constraints of traditional top down 'driven' communications. It is unacceptable to speak of interests when needs are the root of the problem. To make progress toward resolution, mediations must be clearly intentioned and responsibly constructed by common need-oriented goals. The motivation of the mediation must be understood and accepted by all participants and all must be collaborators in the process orientation.

In the following sections, I examine mediation strategies used in specific cases to identify, contrast and compare *outcome-driven* and *process-oriented* approaches.

SELECTED CASES OF ENVIRONMENTAL MEDIATIONS

To underscore the often subtle differences in mediation approaches and the significance of these differences to what we understand mediation to be, I have selected two cases that illustrate *outcome-driven* and *process-oriented* approaches respectively. The case studies selected represent very different mediation scenarios. The first is an example of the regional interactions between various resource users, the agency regulating and managing the resource, and a management council that perhaps by default, functionally mediates between the two. In the second case, mediations take on global proportions with transnational and transcultural constituents, a formal United Nations mediation process and an NGO acting as informal mediator within an entirely separate mediation process. While these mediation scenarios vary in nature and scope, they share one significant common thread – both cases involve 'deep-rooted' conflicts. In only one case however, will coercive power be treated as an impediment and neutralized. In this case, the facilitator fosters a dialogue that enables 'less equal' stakeholders to participate equally in finding resolution to conflict issues.

Process-Oriented Approach



Process-oriented approach applied to interest-based strategy. A has multiple interests as does B. The significance of interests is indicated by size and the investment/attachment to interest is indicated by proximity to A or B. Some interests met through consensus in an outcome-driven approach may become less important to the process as a whole. Conversely, other interests may now take on new meaning within the process. These are represented by broken circles. The focus of the mediation is on what can be learned through the process of dialogue. A and B are encouraged to engage in dialogue, thus building trust and developing a better understanding of each other's needs. There is less of a focus on specific interests/issues. Consensus may develop more slowly, but broader agreement (i.e. on issues that might otherwise be compromised) may be reached. The additive character of this approach is the knowledge/understanding learned through the dialogue process represented by the colored space conjoining A & B.

Figure 3. Process-oriented approach to interest-based strategy.

Case 1 – Gulf of Mexico Fisheries Council Meeting⁴

The Magnusson Act gives Regional Fishery Councils ‘authority’ over designated marine regions. But while the Councils are mandated to prepare fishery management plans for their authorized regions, they are limited to what essentially amounts to making recommendations that flow through the management agency to the Secretary. When the management agency (NMFS – National Marine Fisheries Service) plans regulation changes within the fisheries, the agency is required to give public Notice and entertain the recommendations of the fishery council. One of the roles of the Gulf Council (GC) then, is to provide a public forum to give “...all interested persons the opportunity to be heard...”(Magnusson Act [amend. 10/96] www.nmfs.noaa.gov). While the Gulf Council is not mandated to act in a formal capacity of mediator between NMFS and various stakeholders, its role has evolved into one that includes information gathering, hearing stakeholder concerns, considering concerns and conflicting information, making recommendations based on equity, and acting as facilitator for conflicts to be resolved.

The Council’s regional authority as a ‘watchdog’ entity of fishery resources has evolved into the Council acting in a buffering role between contentious stakeholders and a management agency with firm ideas and direct access to the Secretary. Figure 4 is a simplified relational representation of the Gulf Council, NMFS and fisheries resource stakeholders.

Typically the meetings have several ‘closed’ sessions regarding items on the agenda prior to the meetings for public testimony. Resource users are notified by NMFS of upcoming council meetings and the agenda items. Matters not on the agenda are not open for discussion. A democratic format is used with members of the public registering before the meeting to voice their representations before the configured council meeting. The meeting has a formal courtroom configuration (Figure 5).

On May 12, 1999, ‘fishermen’,⁵ business representatives, government officials, lawyers and other concerned citizens gathered in Austin, TX, for a Gulf of Mexico Fishery Management Council meeting. This meeting was one of a series scheduled around the Gulf – the same agenda, but different locales to increase public access.

“Someday science is going to catch up with reality”. This phrase (and similar words) offered by fishers is heard several times during the meeting. One by one, they approach the podium to give testimony before the tribunal. Many of the exchanges are rapid, amidst paper shuffling, discrete consultations between the two tiers of ‘official representatives’, clerks speaking discretely into recording devices. One of the debates is on the timing of opening the season for commercial fishery:

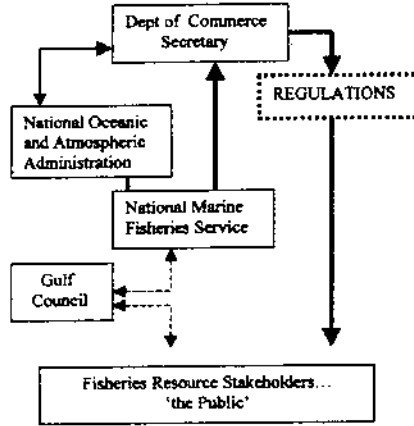


Figure 4. Simple Relational Chart of fishery stakeholders and management entities

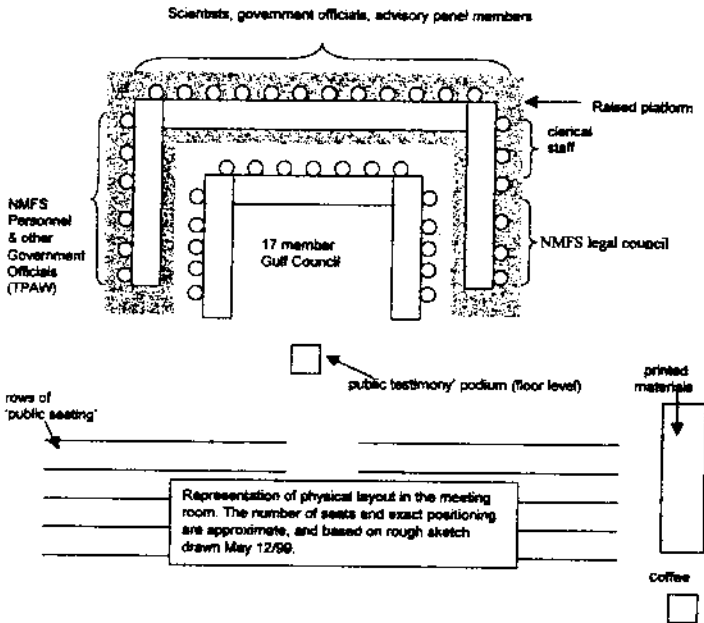


Figure 5. Physical format of Gulf Council meeting May 12/99 in Austin, Texas

Kimmer (NMFS): Fishery has been very co-operative “If they weren’t, they wouldn’t have been able to be so easily closed. Its inappropriate to open on National Holiday” (MLK Day)

GC member: “Haul happens so fast monitoring’s impossible. Weren’t even any boardings last year - they (fish and wildlife agents) couldn’t find the boats.”

Agency official (NMFS): Suggests ‘leave the dock’ time specification for monitoring.

GC member: Says this is unfair because LA (Louisiana) docks inland. LA fishermen would lose hours in the derby.

From floor: “Why not open MLK Day?” and “Irrelevant when you leave the dock – citations can only occur if gilled fish are found on the boat” (*people from the floor shouting at once, disorder erupts...several seconds pass then a voice over the din...*)

Kimmer (NMFS): Throws leave the dock time question at Gibson (FL fisherman) who Kimmer calls “an expert” ... (*quieting in the room*)

Gibson (FL): “Differences in equipment mean different reasons for going out. We must make access fair field of play. We’ll (*fishers*) play by rules...whatever they are.”

Kimmer (NMFS): Motions for commercial opening day after MLK Day. (*GC passes motion*) Commends GC on their voting. (*loud muttering, questions, confusion on the floor – there has been no clarification on opening time, leave the dock, or monitoring issues*)

Moderator: (*bringing room to order*) “I’m just the guy who’s lost in the middle of the road, waiting to be found, looking for some stability within the fisheries.”

The physical structure of the meeting is specifically designed to create a power hierarchy, with the Gulf Council (GC) members at floor level inside a raised platform where government ‘officials’ from NMFS, Texas Parks and Wildlife, and an armory of scientific experts and lawyers sit. Removed to the ‘public gallery’, the citizens (for whom ‘process’ is staged) are excluded from activities in the inner sanctum. The use of a microphone system means that only ‘public’ communications will be heard, yet the presence of covert communications will be seen. Court-like and adversarial, the ‘negotiations’ bring win/lose contentiousness. But of greater interest from a power/process perspective, are the subtle ways in which power is deployed and communicated, and what changes result from this.

The debate on when to open the commercial fishery has direct impact on the control that NMFS perceives they will be able to exert on this sector. They are particularly vocal in this exchange. GC members, in an honest attempt to represent concerns relevant to issues at hand, unwittingly provide a smokescreen to the maneuverings of the NMFS official who holds ‘monitoring’ up as a critical consideration of setting a specific ‘leave the dock time’. Arguments from stakeholders are rampant, and in the midst Kimmer (NMFS) isolates and blindsides Gibson (a commercial fisherman from Florida). Gibson does not know the direction

Kimmer is taking and offers a diplomatic hedge. Having silenced fisher and GC opposition by using Gibson as a foil, Kimmer makes his motion and it is approved. There is general confusion regarding the meaning of the motion. This is borne out by the din in the room and the closing remark of the moderator. The rationale of NMFS's motion is not revealed at the meeting, nor are the details clarified. This adds to the perception of secrecy and the significance of the motion.

Power is at once product and means of production as it is gained and lost in trade and sacrifice between and within stakeholder groups. In these exchanges, the exertion of power by NMFS (through the GC) is recognized in the actions of those stakeholders who *react* to their perceived disempowerment. The proposition that the GC holds no power is evidenced in the minimal participation of the council in the debate and the lack of reaction directed toward the council by both NMFS and the fishermen. Only once does NMFS subtle control seem overwhelmed, and it appears that the disorder is deliberately calculated, as is its diffusion.

Perhaps because of its inability to exert power over both NMFS and resource stakeholders, the Gulf Council has filled the roles of educator, facilitator, negotiator, and buffer. In areas of contentiousness between NMFS and multiple fishery stakeholder groups, the Gulf Council through public forums, assessment panels, and regulatory recommendations, has attempted to act as an intermediary. But what appears to be a lack of authoritative legitimization renders many of these functions impotent.

While there is an attempt at the notion of public debate and general agreement (at least legalistically) on the consideration of stakeholder interests, the process is unmistakably *outcome-driven*. Final decisions on fishery matters are often perceived as arbitrary; always they are authoritarian. At best, it appears that the Gulf Council meetings provide opportunities for the appearance of political participation, access to advisory panels and stakeholder venting.

Case 2 — The Neptune Group and UNCLOS III (The Third United Nations Law of the Sea Conference), 1973 - 1982 ⁶

In 1967, a proposal was put before the United Nations by Dr. David Pardo, UN Ambassador from Malta, that the seabed and ocean floor be declared the 'common heritage of mankind' and further, that an international, independent agency be established to "...assume jurisdiction over this area 'as trustee for all countries', and control all activities therein" (Glassner 1990). The General Assembly immediately set up a task force to work on the 'peaceful uses of the seabed and ocean floor'. The work of this committee became the foundation of the Third United Nations Conference on the Law of the Sea (UNCLOS III) convened in 1973 and ending with the signing of the UNCLOS III Treaty in 1982. The treaty established a more precise and extensive delineation of territorial waters than its precedent, and through this agreement the foundation was laid from which closely linked issues regarding the marine environment, the conservation of 'living resources', seabed mining and national security were negotiated.

The achievements of UNCLOS III were largely supported by the tenacious work of the Neptune Group, which emerged as a response to the political conundrum that engulfed Law of the Sea deliberations. The Neptune Group was an amalgamation of several NGOs (non-government organizations) spearheaded primarily by members of the Ocean Education Project (OEP), the United Methodist Law of the Sea Project (UMLSP), and the United States Committee for the Oceans – all from the U.S. The individual resources of the NGOs were scarce, but their worldwide network of secular and non-secular organizations synergized into an impressive effort (see Figure 6).

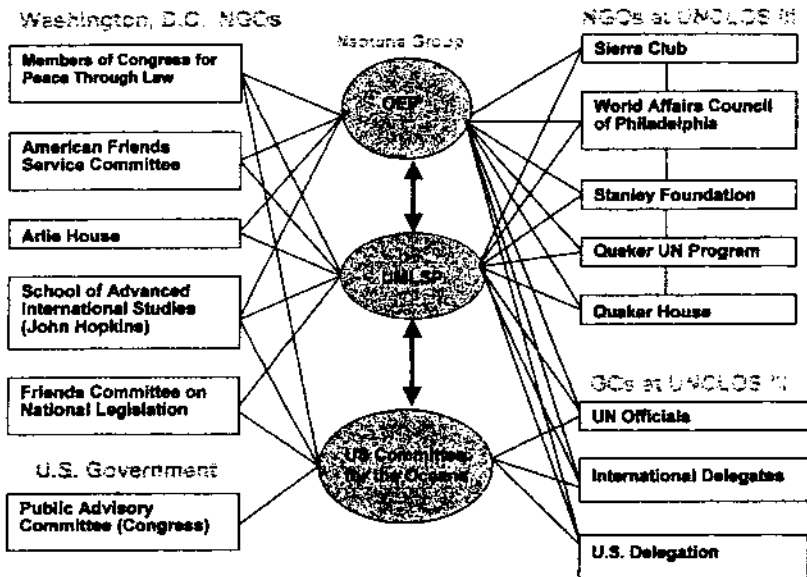


Figure 6. A relational representation of the Neptune Group network.

Initially, the Neptune Group had aspirations of influencing delegates to UNCLOS III in the direction of equitable international distribution of revenues gained from deep sea and continental shelf extraction. Similar myopic approaches however, had alienated some other environmental NGOs from UN delegates and officials. Neptune learned instead to listen intently to the needs expressed by delegates (Levering and Levering 1999) and to flexibly play multiple roles as needed.⁷ The group established a reputation for credibility, and as 'honest brokers' provided accurate, useful information in settings of *recognized neutrality*.⁸

The following quotes from delegates provide evidence of the enabling effects of not an equalization of power, but rather the setting aside of it in favor of a kind of 'safe harbor':

(Neptune Group's) strongest suit was in bringing together delegates and people with real concerns to exchange views and be frank without having to commit to anyone...to take off coats and talk like human beings. - [Bernardo Zuleta (U.N. Official), (Ibid.:151-152)]

The Neptune Group provided a neutral setting and it was very useful ... It was possible for many Third World delegates to see the U.S. negotiating team solve problems with them rather than imposing preconceived ideas [emphasis mine] because of Neptune's help.- [John Temple Swing (U.S. Delegate), (Ibid.: 152)]

NGOs were helpful in facilitating dialogue between the United States and key G77 negotiators on critical issues, or in getting it going again when it seemed to be deadlocked.- [Markus G. Schmidt (1989), (Ibid.:150)]

In contrast, some participants, primarily from the U.S., considered the involvement of the Neptune Group to be a nuisance – perhaps even an impediment to the negotiation process:

(Some colleagues in the U.S. State Department) "were annoyed by the NGOs" and [...]some officials "felt the Leverings (of the Neptune Group) were overly naïve about the motives of Third World countries." - [Otho Eskin (State Department), (Ibid.: 152)]

I thought the brainstorming sessions (arranged by Neptune) were more helpful at the time than I did in retrospect. They gave more immediacy to the issues than they deserved. The more people who talked [at the seminars], the more they gave the sense that it would work.- [George Aldrich (U.S. Negotiator), (Ibid.:150)]

The comments above provide a contrast on perspectives from delegates who at least broadly share the same interests (those of the United States). The comments of Eskin and Aldrich (distrust, superiority, and adjusted recall) reflect the inability to break away from the focus on *outcome-driven* approaches used in the formal negotiations under the auspices of United Nations intervention and facilitation. Swing's comment is sensitive to international perceptions of the motives and power strategies exercised by U.S. and appreciative of the opportunity to transcend issues of nationalist power to deliberate on issues of more substantive global content. Swing is able to focus his rationale on what he can learn and what others can learn through the *process*.

It would be inaccurate to suggest that all roles and activities of the Neptune Group were *process-oriented*. They were not. Stateside, members of the Neptune Group lobbied hard for specific legislation; very much an outcome-driven endeavor. It would also be inaccurate to hold the formal negotiations of UNCLOS III up as process-oriented. There is nothing in the literature to suggest that the formal negotiations were anything but outcome-driven. It is because the Group found itself in a position where need dictated a very specialized non-partisan role, that a unique niche emerged – one outside the formal negotiation process but interconnected with the actors. Only in this niche (while attending the many sessions of the Conference) did the Neptune Group specifically avoid an outcome-driven approach with its inherent power displays. Here the roles of honest broker, educator, communicator, facilitator, were roles of service – nurtured with careful neutrality.

SUMMARY

This paper has presented the separate theoretical underpinnings of interest-based and position-based strategies in mediation. An examination of these strategies has illustrated a fundamental difficulty in some mediation situations in which the motivation is *outcome-driven*. There are many situations in which an *outcome-driven* approach is entirely satisfactory. In 'deep-rooted' conflicts where issues are non-negotiable however, an *outcome-driven* approach is unsatisfactory. More troubling is the potential for further injury when attempts are made to translate deeply-rooted needs into negotiable interests. It is not enough to develop interest-based mediation models that pay lip service to participant equality when power disparities are present and exercised. Although appealingly efficient over the short term, they are ineffective in fostering the long-term understandings necessary in lasting resolutions. A *process-oriented* approach proves far more effective and durable in the long term, particularly although not exclusively in mediations associated with global environmental and resource conflicts.

The cases presented have been useful in demonstrating the outcome-driven and process-oriented theoretical models discussed in this paper. Case 1 illustrated the confusion and frustration generated by an *outcome-driven* public process whose legislated intent is to provide public access and equality to stakeholders, but where

the latent intent and practice is social control and maintenance of an authoritarian status quo. Case 2 exemplified a *process-oriented* approach that emerged as a direct result of recognition by a mediating organization that an *outcome-driven* approach would not work. An entirely separate mediation process developed out of the inadequacy of the formal *outcome-driven* negotiations. The success of the *process-oriented* approach in diffusing power displays and providing a 'safe' zone for dialogue, garnered legitimacy for the mediating organization and is evidence of the appropriateness of this approach for 'deep-rooted' global conflicts.

In many domestic and in international stakeholder conflicts, an *outcome-driven* approach will continue to be the expeditious and entirely satisfactory way of dispatching resolution. In areas of long-standing and 'deep-rooted' conflicts however, a *process-oriented* mediation approach is urgently needed. Its application on situations of stakeholder conflict, where 'outcomes' have deep and abiding consequences on lives and livelihoods, would appear far more desirable than the situations of contentiousness that are maintained by present methods of stakeholder conflict resolution. Granted, it is costly in time and effort. But much of the time investment would be reduced if participants were brought together as early as possible after conflictive areas were identified and *before* these stakeholders became entrenched in positions that may have little to do with the conflict at hand. Intuitively, the appropriateness for *process-oriented* mediations as a preventative measure is clear. This of course would necessitate some vigilance in government agencies and other organizations to spot *potential areas of deep conflict* resulting from imminent environmental and/or policy changes. On a global scale, the appropriateness for *process-oriented* mediations in accomplishing an on-going dialogue between nations is reasonably the better effort toward participatory and cooperative resolution to issues.

The complexities of transnational and transcultural conflicts will continue to be problematic. The gravity of irreconcilable conflict compels academicians and professionals to understand and make understood, the ramifications of continuing to use mediation practices that exacerbate the 'deep-rooted' conflicts they are intended to resolve. We must ensure that mediation approaches that *can* foster equal footing and those that *cannot* are clearly distinguished in theory and in practice. It is incumbent upon those working in the area of mediation to understand the situational context in which a mediation approach is to be applied, clarify the theoretical content of the mediation approach, and then align intent and practice.

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FOOTNOTES

¹ See a reply by Stulberg (1981) to Susskind (1981) on ethical and logistical uncertainties of pareto optimal outcomes via consensus, in Bacow and Wheeler (1984: 248-251); Moore (1996) refers to BATNA as 'negative settlement range' (277), see also cross-cultural difficulties in setting BATNA's (279); Neuman (2000) on limitations of consensus.

² See also Bacow and Wheeler (1984) on negotiations entrenched in convoluted procedural machinations and used as smokescreens for non-compliance/accountability; Mansbridge (1990:22) on common interest and

conflict "...we need deliberative processes as well as adversary ones".

- ³ Fisher cites Burton (1965, 1968, 1972, 1979, 1984, 1987, 1990a). See also *Conflict Resolution: its language and processes* (Burton, 1996).
- ⁴ The material for this case study is taken from observation notes (May 12/99) from the Gulf Council meeting in Austin, TX. and from thesis research (Norris-Raynbird, 2000) cited in reference section.
- ⁵ The use of this term is due to the resource users self-naming, and includes male and female commercial fishers, recreational fishers, charter and party boat operators. See Norris-Raynbird (2000) for semantic details on charter and party boat operators in the Gulf of Mexico.
- ⁶ Materials for this case study taken from: Levering and Levering (1999); Glassner (1990); Buck (1998). For full citation see reference section.
- ⁷ The Neptune Group donned many roles in supporting the negotiation of a Treaty over the years. The activities of members when Stateside were often political as they advocated on behalf or against specific issues and legislation. More specifically, the nationalist agenda rampant in the U.S. in the 70's, was of grave concern to the viability of a treaty and members rallied to subdue the effects of nationalism in favor of a worldview ethic and practice. During the many UNCLOS III sessions, however, the Neptune Group adopted a political neutrality, providing educational and public relations services, facilitating meetings and social gatherings for worldwide delegates, providing accurate communications for the media and arranging for independent scientists and experts to interface with delegates.
- ⁸ The recognition of neutrality is evidenced in the perceptions of delegates responding to the *actions and articulations* of members of the Neptune Group. In Levering and Levering (1999), Bleicher (1990) notes the "universalist point of view" taken by the Neptune Group, and Richardson (1990) describes the Neptune Group as having "...reflected a point of view that was aware of the U.S. interests and which wished to avoid undercutting those interests, but... was also sympathetic and fair-minded to the Third World point of view". Glassner (1990) notes that the co-operative activities of Neptune Group helped delegates in achieving a 'fair and practical' treaty. Political neutrality is crucial to cooperative environmental and resource regimes as noted by Buck (1998) in reference to SCAR (Scientific Community on Antarctic Research). But it is more than presenting politically neutral rhetoric. Buck (following Weberian theory) suggests that the appearance of neutrality may be more important than its reality. In the short term, the *appearance* of neutrality may have the same or similar effects. Appearances, however, are difficult to sustain over time and

under political pressure. Deudney argues (in Deudney and Matthew (1999:214) that its not enough to 'talk the talk': "Nationalist sentiment and the war system have a long-established logic and staying power that are likely to defy any rhetorically conjured redirection toward benign ends". The credibility and legitimacy of the Neptune group was earned by 'walking the walk' of neutrality during UNCLOS III conventions. Maintaining organizational legitimacy means *both* 'talking the talk' and 'walking the walk', see Scott (1995).