

Chapter 5 Collaborative conflict management procedures

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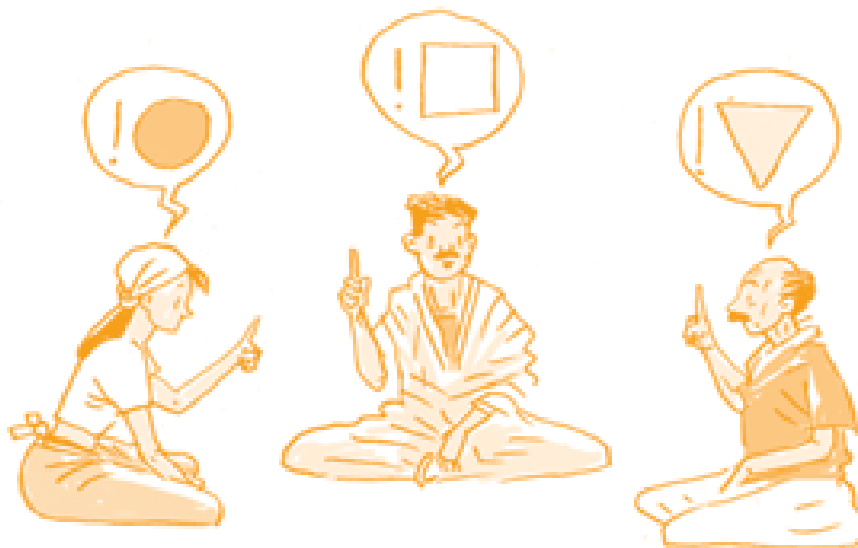
SESSION 5.5 THE ROLE OF THE MEDIATOR

SESSION 5.6 A MAP OF THE MEDIATION PROCESS

SESSION 5.7 MEDIATION MEETING – INITIAL STAGES

SESSION 5.8 MEDIATION MEETING – MIDDLE STAGES

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Collaborative conflict management procedures

The focus of this trainer's guide is on informal and collaborative conflict management procedures, particularly interest-based negotiations and mediation. Most of the activities and exercises in this chapter have therefore been designed to explore negotiations and to prepare for and engage in the various steps of the mediation process.

Informal procedures have considerable potential for addressing natural resource conflicts, but conflict managers should not assume that collaborative conflict management procedures are always possible or desirable. The first activity looks at a range of different procedures for managing conflicts. Its aim is to build participants' understanding of each procedure's strengths and limitations, so that they can make informed choices.


Sessions 5.3 and 5.4 introduce interest-based negotiations and explore the factors influencing the "negotiability" of a case.

Before carrying out the activities in this section, the trainer should make sure that participants are familiar with basic communication and facilitation techniques, such as active listening, open-ended questions, reframing and stacking, as presented in Chapter 4. The trainer should also check that participants are familiar and comfortable with the use of case studies and role plays.

The mediation process has been divided into three phases – initial, middle and final (Sessions 5.7 to 5.9). Chapter 6 contains three extended role plays, which together cover all these stages. To give as many participants as possible the chance to mediate, participants can take turns in the mediator role. Before starting the mediation exercises, participants should have a clear understanding of the mediation approach and the role, functions and responsibilities of the third party/mediator (Session 5.5).


As parties usually differ in the form or amount of power they possess in relation to each other, mediators need to know about these various forms of power and how they can be used to move negotiations towards agreement. Session 3.7 introduces forms of influence and power and strategies for exercising them.


SESSION 5.1 DIFFERENT CONFLICT MANAGEMENT PROCEDURES

 **PURPOSE:** to help participants recognize the strengths and weaknesses of different conflict management procedures.

 **CROSS REFERENCE:** Section 2.2.

 **TIME:** one hour.

 **MATERIALS:** markers, flip charts, cards.

 **PREPARATION:**

- prepare cards for each of the terms “negotiation”, “mediation”, “arbitration” and “adjudication” (Attachment 5.1.A “Definition of terms”);
- copy Attachment 5.1.B “Continuum of conflict management approaches” on to a flip chart.

STEPS

- 1 Explain that the purpose of this session is to examine the various procedures available for managing conflict. Participants are likely to be familiar with these procedures, or will at least have heard of them. Display the cards with the terms, and explain that participants will have an opportunity to reflect on the experiences they have had with these different procedures.
- 2 Ask participants to form groups of four to discuss and define each of the procedures. They should note their definitions on a piece of paper. Give them 15 minutes to do so.
- 3 After 15 minutes, participants meet with representatives from other groups to compare their own definitions with the terms as they were defined for this training (Attachment 5.1.A). Groups should discuss the differences among, as well as the inherent strengths and weaknesses of, the selected approaches. After 30 minutes ask one person from each group to present its findings. Use Attachment 5.1.C “Inputs for discussion” to guide the discussion, clarifying the terms as necessary.
- 4 In conclusion emphasize the following key learning points.

 **KEY LEARNING POINTS**

- The various conflict management approaches differ in terms of the amount of influence that the conflict parties have on the process and outcome. The further towards the right of the continuum (Attachment 5.1.B) the process is, the less influence the conflict parties will have.
- All approaches have their own inherent strengths and limitations; no conflict management approach works in all situations.
- When selecting the most appropriate procedure, each should be examined regarding the following factors:
 - the openness of each party to using it;
 - the effort required to implement it;
 - the amounts and kinds of resources required to implement it;
 - the risks and opportunities entailed;
 - its likely impacts on relationships;
 - its likely impacts on allowing satisfactory negotiations;
 - the likelihood of its attaining substantive goals or outcomes.
- The conflict parties' existing capacity to manage conflict should always be taken into account, and not be undermined by unnecessary interference.
- This training focuses on negotiation and mediation as informal and collaborative approaches to conflict management. Informal approaches are voluntary in that nobody can be forced into the negotiation process or into compliance with an agreement. Parties' willingness to enter negotiations depends on such factors as:
 - the perceived benefits from resolving differences rather than prolonging the conflict,
 - trust in the process; and
 - the availability of alternatives.

HINTS This session should be followed by Session 5.4 "Factors influencing the negotiability of a case".

Attachment 5.1.A Definition of terms

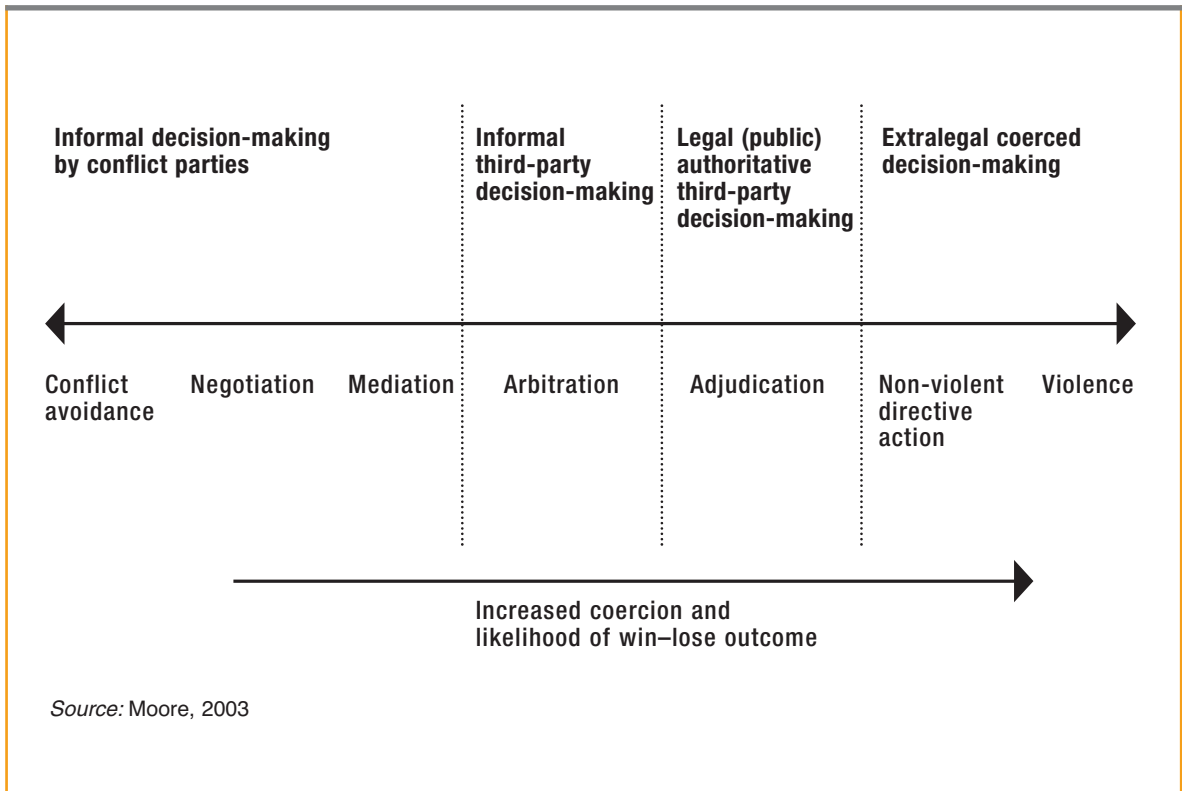
Negotiation: a discussion and decision-making process among opposing parties. It aims at finding an agreement to end the dispute.

Mediation: the process whereby an acceptable third party with limited or no authoritative decision-making power assists the main parties in a conflict to resolve their dispute.

Arbitration: an informal process whereby the parties submit the issues at stake to a mutually agreeable third party, who makes the decision for them.

Adjudication: a process whereby an authority (a judge or other official) makes a decision based on the norms and values of the society and in conformity with legal statutes.

Attachment 5.1.B Continuum of conflict management approaches



Attachment 5.1.C Inputs for discussion

Negotiation and mediation¹

Strengths	Limitations
<p>Can help overcome obstacles to participatory conflict management that are inherent to legislative, administrative, judicial and even customary approaches.</p> <p>Promotes joint decision-making and seeks voluntary agreement among disputants.</p> <p>Involves processes that resemble those already existing in most local conflict management systems, including flexible, low-cost access.</p> <p>Fosters a sense of ownership in the process of implementing solutions.</p> <p>Emphasizes capacity building within communities so that local people become more effective facilitators, communicators, planners and managers of conflict.</p>	<p>Often fails to address structural inequalities. May encounter difficulties in getting all stakeholders to the bargaining table.</p> <p>Cannot overcome severe power differentials among stakeholders, so vulnerable groups such as the poor, women and indigenous people remain marginalized.</p> <p>Usually results in decisions that are not legally binding, so enforcement depends solely on the willingness of all parties to comply with an agreement.</p> <p>May lead some practitioners to use methods developed in other contexts and cultures, without adapting them to local contexts.</p>

Arbitration

Strengths	Limitations
<p>When the subject of the dispute is highly technical, arbitrators with the appropriate expertise can be appointed.</p> <p>Is often faster and cheaper than adjudication in court.</p> <p>Is more flexible than the courts, so parties can choose procedures that are convenient to them.</p> <p>Provides a private and confidential procedure.</p>	<p>In some legal systems, arbitral decisions are less fully enforced than judgments.</p> <p>Arbitrators are generally unable to order interlocutory measures against a party, making it easier for parties not to adhere to a decision.</p> <p>Rule of the applicable law is not binding, and arbitrators are not subject to overturning on appeal, making it more likely that they will make decisions based on their own ideals.</p> <p>Gives conflict parties only limited participation in decision-making.</p>

1. In general, it is useful to deal with the different procedures one by one. Discussion of negotiation and mediation have been combined, however, because their strengths and weaknesses are similar.

Adjudication

Strengths	Limitations
<p>Uses official legal systems, thereby strengthening the rule of State law, empowering civil society and fostering environmental accountability.</p> <p>Is officially established, with well-defined procedures.</p> <p>Takes national and international concerns and issues into consideration.</p> <p>Involves judicial and technical specialists in decision-making.</p> <p>Where there are extreme power imbalances among the disputants, it may better protect the rights of less powerful parties because decisions are legally binding.</p> <p>Decisions are impartial, based on the merits of the case, and with all parties having equity before the law.</p>	<p>Is often inaccessible to the poor, women, marginalized groups and remote communities because of cost, distance, language barriers, political obstacles, illiteracy and discrimination.</p> <p>May not consider indigenous knowledge, local institutions and long-term community needs in decision-making.</p> <p>May involve judicial and technical specialists who lack the expertise, skills and orientation required for participatory natural resource management.</p> <p>Uses procedures that are generally adversarial and produce win–lose outcomes.</p> <p>Gives conflict parties only limited participation in decision-making.</p> <p>May be more difficult to reach impartial decisions when there is a lack of judicial independence, corruption among State agents, or an elite group that dominates legal processes.</p> <p>Uses the highly specialized language of educated elite groups, thereby favouring business and government disputants over ordinary people and communities.</p>

SESSION 5.2 COMPETITION AMONG NGOS

**PURPOSE:**

- to demonstrate how assumptions influence and determine the outcome of negotiations;
- to demonstrate how positional bargaining tends to neglect what is in the parties' own best interests.

**TIME:** one and a half hours.**MATERIALS:** flip chart, cards and coloured pens.**PREPARATION:**

- photocopy Attachment 5.2.A “Instructions for group work” for each participant;
- copy the table in Attachment 5.2.A and all of Attachment 5.2.B “Scoring sheet” on to a flip chart.
- copy Attachment 5.2.C “How assumptions influence and determine the outcomes of negotiations”.

**STEPS**

- 1 Announce that this is a negotiation exercise. Do not explain the purpose of the activity.
- 2 Explain that two non-governmental organization (NGO) consultancy companies – Alpha and Best – are competing for a subcontract to implement projects. In a time of decreasing project funds and stiff competition, both NGOs seek contracts for as many projects as possible. The donor will give more projects to the NGO that demands fewer overheads. Show the prepared flip chart and explain how offering a “discount” influences the profits the NGOs can make, by reducing the profit per project. Both NGOs have to submit their tenders without knowing what the other will offer.
- 3 Divide participants into two groups – Alpha and Best – and provide them with the photocopied instruction sheet.
- 4 Start the first round. The groups have ten minutes to discuss their goal and define the strategy for reaching it. They then submit their tenders to the trainer by writing the discount they are offering – 10, 20 or 30 percent – on a card. The trainer announces the outcome of the first round and records the profits on the scoring sheet.
- 5 Repeat the exercise for eight rounds, following the same procedure.
- 6 For the third and sixth rounds announce that there are possibilities for direct negotiations. Two representatives of each group can meet for five minutes of secret discussions. The resultant agreement will be informal and unbinding, i.e., the groups can decide to ignore it.

- 7 After the eighth round compare the groups' accumulated profits and discuss the results using the following questions:
 - What goal did you set in the first round of tenders?
 - What did you intend to achieve in this exercise?
 - What was your strategy? Was it successful? Why or why not?
 - How did the ability to negotiate with the other group influence your strategy?
 - What effects did your strategies have on the outcome, in terms of profit?
 - How was the relationship and attitude towards the other group influenced by your strategy, especially when negotiated agreements were not respected?
- 8 Ask participants about their operating assumptions during the game and relate these to the behaviour displayed by the groups. Participants usually mention some questionable assumptions, such as “they will undercut us when they have the opportunity”, “our fears must be their intentions” or “more for you means less for me”. Explain that such assumptions result in “win–lose”, “either us, or them” attitudes and sub-optimal results. Mention – showing the scoring sheet – that the maximum profit each team could have achieved is US\$540 000 (usually both teams have “earned” considerably less than would have been possible in a situation of cooperation and trust). Emphasize that cooperation and trust would have helped each group to achieve its legitimate interest of maximizing profit.
- 9 To conclude the session show, Attachment 5.2.D and explain how assumptions and beliefs generally drive how the participants in negotiations think and act, and ultimately determine the results.
- 10 Wrap up the session by discussing the following key learning points.

KEY LEARNING POINTS

- The wish to win over the opposing parties usually results in:
 - irrational behaviour – harming the opponent becomes more important than realizing mutual benefits, and own interests are neglected, resulting in material disadvantages and spoiled relationships;
 - failure to achieve the maximum profit that would have been possible in an atmosphere of trust and cooperation.
- It is important to pay attention to the process of negotiations. Participants do not need to trust each other, but acting trustworthily themselves helps to increase their “relationship power”.
- Exercise often triggers competitive behaviour, but “beat the other side” is a simplistic measure of success. By deciding to beat the other side, participants risk creating the problem they are trying to avoid.
- People’s actions are often guided by such questionable assumptions such as “more for them, means less for us” or “our fears must be their intentions”. Assumptions should not be confused with facts.
- Negotiators have to decide whether they want to destroy or create value. Maximizing value for both sides depends on participants’ behaviour in negotiations.
- Intentions do not always have the expected impacts.

HINTS This exercise is best followed by Session 5.3 “From positions to interests in negotiations”.

Attachment 5.2.A Instructions for group work

Competition between NGOs

Your team represents one of two competing NGOs:

- Alpha Consult
- BEST Ltd.

Both NGOs implement development projects as subcontractors for a big donor organization. Both try to maximize the number of projects for which they will be subcontracted. The donor organization will give more projects to the NGO that demands fewer overheads, but to avoid overdependence on one NGO, neither will be subcontracted for all the donor's available projects.

In a time of decreasing project funds and stiff competition, both NGOs try to win projects by reducing their overheads and offering discounts of 10, 20 or 30 percent on their previous prices.

If both NGOs offer the same discount, they will get equal numbers of projects and make the same profits. If one NGO is cheaper than the other, it will get more projects and make more profit.

The table below shows the profit the companies can make (in US dollars).

		Alpha Consult		
		10%	20%	30%
Best Ltd.	10%	600 600	300 500	100 700
	20%	500 300	400 400	200 500
	30%	700 100	500 200	300 300

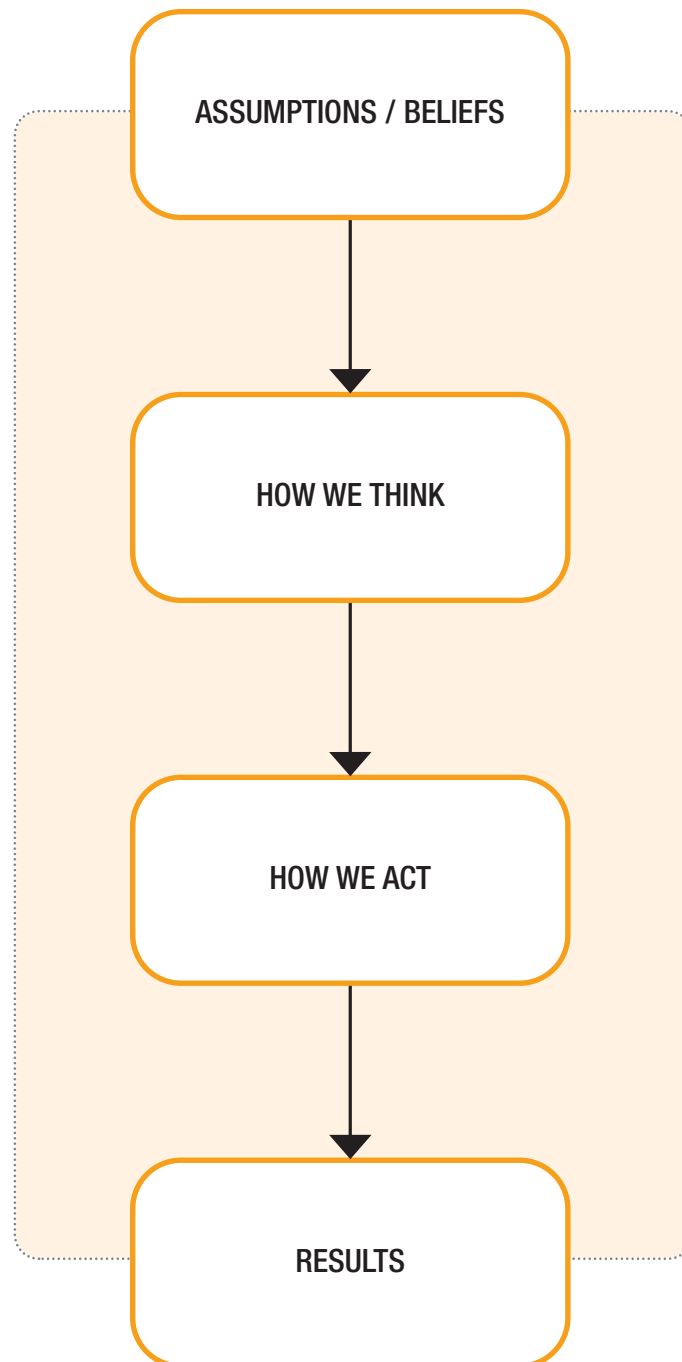
Note: the figures in black show the profit for Alpha Consult, the figures in orange show the profit for Best Ltd.

What percentage discount is your team prepared to offer?

Attachment 5.2.B Scoring sheet

Year (round)	Alpha Consult			Best Ltd.		
	% offered	Profit for the year	Accumulated profits	% offered	Profit for the year	Accumulated profits
1						
2						
3						
4						
5						
6						
7						
8						

Attachment 5.2.C How assumptions influence and determine the outcomes of negotiations



SESSION 5.3 FROM POSITIONS TO INTERESTS IN NEGOTIATIONS

**PURPOSE:**

- to help participants distinguish between position-based and interest-based negotiations;
- to introduce and apply a tool that helps move on to negotiations in conflict situations.



CROSS REFERENCE: Section 2.3.



TIME: one hour.



MATERIALS: markers, flip charts, cards.



PREPARATION: copy the following attachments on to flip charts:

- Attachment 5.3.A “What is a good outcome from negotiations?”;
- Attachment 5.3.B “Triangles diagram”;
- Attachment 5.3.C “Positions versus interests example”;
- Attachment 5.3.D “The four basic points of negotiations”.

**STEPS**

- 1 Start the session by asking participants how they would define negotiation. Record their suggestions and explain that a simple definition of negotiations is *“all those occasions when you try to persuade someone or someone else tries to persuade you”*. As this implies, people are negotiating all the time.
- 2 Explain that negotiations often take the form of positional bargaining, in which parties start from their own positions on an issue and bargain with each other until they can agree on one position. Provide an example of a typical bargaining situation and how it results in mutually unsatisfactory outcomes or spoiled relationships (use the example given in attachment 5.3.C or make up something based on “haggling over a price” as a typical example of positional bargaining).
- 3 Many people argue that positional bargaining does not produce good agreements. It is an inefficient means of reaching agreement, and any agreement reached through positional bargaining tends to neglect parties’ interests. It encourages stubbornness and so tends to harm the parties’ relationships.
- 4 Ask participants how they know that they have reached a good outcome when they see it. Ask them what their measures of success would be, and compare these with Attachment 5.3.A.

- 5 Explain that positional bargaining is not only likely to produce conflicts, it is also unlikely to serve in solving conflicts. This trainer's guide therefore focuses on principled or interest-based negotiations as a method for reaching satisfactory agreements. Fisher and Ury (1983) develop four principles of negotiation, which can be used effectively to resolve many types of dispute. Show the flip chart of Attachment 5.3.D and explain the principles.

Separate the people from the problem: Remember that negotiators are people first. There are three basic sorts of people problems:

- differences of perception among the parties – we need to understand different perceptions, others' and our own;
- the involvement of a wide range of emotions: people often react with fear or anger when they feel that their interests are threatened – we need to recognize and understand emotions, others' and our own;
- bad communication – we need to practise good communication, which includes active listening, using clear and simple language, speaking about ourselves and not about others, etc.

Focus on interests rather than positions: Good agreements focus on the parties' interests, rather than their positions. As Fisher and Ury explain, "Your position is something you have decided upon. Your interests are what caused you to so decide" (p. 42). Interests explain the underlying motivations behind a position, or what is driving a person to take a certain position. Use the example in Attachment 5.3.C to illustrate the difference between positions and interests.

Interests are what a person wants to have satisfied; they can be needs, desires, concerns or fears. Interests can be substantive, procedural or relationship interests (see Session 2.6). The triangles diagram (Attachment 5.3.B) shows that each party usually has a number of different interests underlying its positions. In any conflict, however, all the parties will share certain basic interests or needs, such as the need for security and economic well-being.

Generate a variety of options before settling on an agreement: Operate on the premise that it is possible to reach an agreement that benefits both parties. Do not accept the first satisfactory solution – probe for even better ones. Generate as many options as possible. Separate the process of inventing options from the process of assessing options and deciding.

Insist that the agreement is based on objective criteria: When decisions are based on reasonable standards, the parties are more likely to agree and preserve their good relationship. The parties must agree which criteria – such as scientific findings, professional standards or legal precedent – is best for their situation. One way to test for objectivity is to ask whether both sides would agree to be bound by those standards. Rather than agreeing on substantive criteria, the parties may create a fair procedure for resolving their dispute. For example, two children may fairly divide a piece of cake by having one child cut it, and the other choose which piece she/he wants.

- 6 Explain that interest-based negotiations work from the assumption that focusing on interests rather than positions increases the chances of achieving a good outcome.

- 7 Divide the participants into small groups and explain the following task:
 - Each group is to use a conflict example (from a previous training session, or based on a case study) to identify two major stakeholder groups with conflicting positions in relation to a resource.
 - The group members should then discuss and identify the positions and interests of these two major stakeholder groups.
- 8 After 30 minutes, reconvene the participants and ask:
 - How easy or difficult was the exercise?
 - What do you think helps in the identification of interests?
- 9 Close the session with the following key learning points.

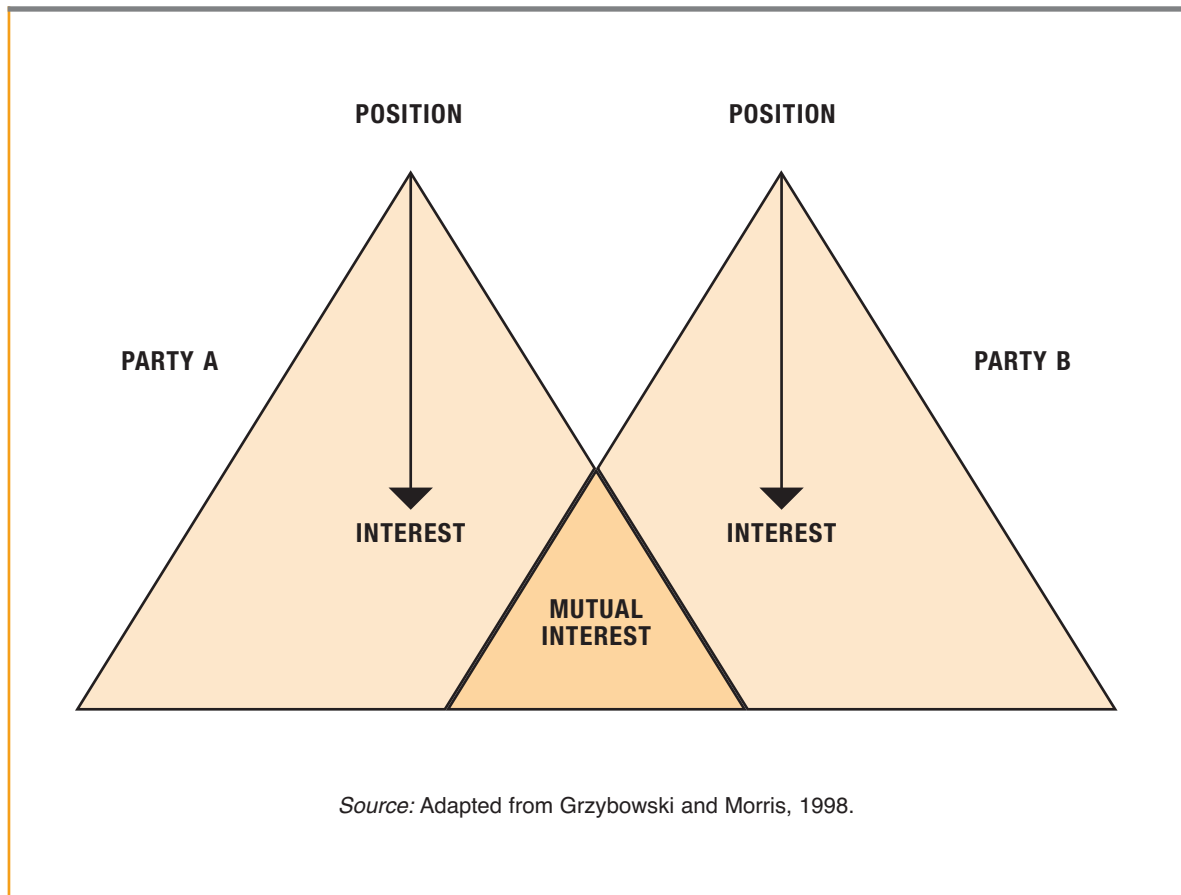
 **KEY LEARNING POINTS**

- **A party that wants the other side to take its interests into account must explain its interests clearly.**
- **The other side will be more motivated to take those interests into account if the first party shows that it is paying attention to the other side's interests.**
- **Discussions should look forward to the desired solution, rather than focusing on past events.**
- **Parties should keep a clear focus on their interests, but remain open to different proposals and positions.**
- **In identifying and separating their positions from their interests and needs, stakeholders should also consider the likely interests and needs of other groups. To go a step further, by moving from rivalry to collaboration, they need to understand:**
 - **how the different interests interrelate or are interdependent;**
 - **that there is more to gain from collaborating than from competing.**
- **The aim of interest-based negotiations is to find interests that are held in common and from which all can derive shared benefit.**

Attachment 5.3.A What is a good outcome from negotiations?

Common measures of success	Proposed measures of success
“Get any deal” or “Get the other party to make more concessions”	Get a deal that satisfies both parties’ interests
Get the maximum possible (“last dollar”)	Create as much value as possible and then share it
Both parties are equally unhappy	Improved relationship between the parties
Avoid conflict	Solve conflict

Attachment 5.3.B Triangles diagram: Improving opportunities for collaboration by moving from positions to interests



Attachment 5.3.C Positions versus interests example

Two sisters quarrel over an orange. Each claims that she wants the orange – this is the position each sister is taking. When they finally agree to divide the orange in half, the first sister takes her half, squeezes it for orange juice and throws away the peel, while the other throws away the fruit and uses the peel from her half for baking a cake.

One was interested in the juice, while the other was interested in the peel – unfortunately they had not bothered to find out what their interests were.

Soft	Hard	Interest-based or principled
Participants are friends	Participants are adversaries	Participants are problem solvers
The goal is agreement	The goal is victory	The goal is a wise outcome reached efficiently and amicably
Make concessions to cultivate the relationship	Demand concessions as a condition of the relationship	Separate the people from the problem
Be soft on the people and on the problem	Be hard on the problem and on the people	Be soft on the people but hard on the problem
Trust others	Distrust others	Proceed, regardless of trust
Change your position easily	Stick firmly to your position	Focus on interests, not positions
Make offers	Make threats	Explore interests
Disclose your bottom line	Mislead about your bottom line	Avoid having a bottom line
Accept one-sided losses to reach agreement Outcome: Give "I give up in order to reach agreement"	Demand one-sided gains as the price of agreement Outcome: Take. "I want my way"	Invent options for mutual gain Outcome: Give and take
Search for the single answer: the one the other party will accept	Search for the single answer: the one you will accept	Develop multiple options to choose from: decide later
Insist on agreement	Insist on your position	Insist on using objective criteria
Try to avoid a contest of will	Try to win a contest of will	Try to reach a result based on standards, independent of will
Yield to pressure	Apply pressure	Reason and be open to reason; yield to principle, not pressure

Attachment 5.3.D The four principles of negotiation

The four principles are:

- 1 people:** separate the people from the problem;
- 2 interests:** focus on interests, rather than positions;
- 3 options:** generate a variety of possibilities before deciding what to do;
- 4 criteria:** insist that the result is based on fair standards or criteria.

SESSION 5.4 FACTORS INFLUENCING THE NEGOTIABILITY OF A CASE

**PURPOSE:**

- to help participants identify and assess the factors that are important in determining the effectiveness of negotiation;
- to help participants consider which conditions make third-party involvement necessary.

**CROSS REFERENCE:** Section 2.3.3.**TIME:** one hour.**MATERIALS:** three pin boards, cards, coloured markers.**PREPARATION:** copy Attachment 5.4.A “Factors influencing negotiability” on to a flip chart.**STEPS**

- 1 Explain that collaborative conflict management procedures, such as interest-based negotiations, have considerable potential in addressing natural resource conflicts. However, conflict managers must not assume that collaborative conflict management procedures are always possible or desired. Instead, it is only through a careful assessment process, which is part of the preliminary conflict assessment, that conflict managers and disputing parties can find out whether either negotiation or mediation has a chance of succeeding and producing a good outcome. Explain that the participants are going to review the circumstances that are favourable, challenging and limiting for interest-based negotiations.
- 2 Form groups of four to five people and give them 15 to 20 minutes to identify and discuss:
 - factors that support interest-based negotiations;
 - factors that challenge or limit negotiations.
- 3 After 15 to 20 minutes, reconvene the participants. Ask one member of each group to explain its findings to the other groups, and ask the other groups to add new points if they have not been mentioned yet. Compare the findings with Attachment 5.4.A to make sure that the main points have been considered.
- 4 Ask participants to identify the conditions under which conflict parties may need the assistance of a third party in their negotiation process. Mention the following conditions, if the participants do not do so themselves:

- Intense emotions are preventing people from reaching a settlement.
 - Communications are of poor quality or quantity.
 - Misperceptions or stereotypes are hindering productive exchange.
 - Parties are unable to reconcile their actual or perceived incompatible interests.
 - Parties lack a clear, common negotiation procedure, or fail to use the existing procedure to their best advantage.
 - Negotiations are hard to start or have reached an impasse.
 - Power differences between parties can only be bridged through somebody ensuring procedural fairness.
- 5 Wrap up the session by showing Attachment 5.4.A, emphasizing the following key learning points.

KEY LEARNING POINTS

- Although it can be hard to decide whether interest-based negotiations have a chance of producing a good and fair outcome for all involved, mediators still have to make a “go or no go” decision.
- No single factor listed in Attachment 5.4.A guarantees success or failure. Mediators cannot personally ensure that agreements will be reached – they can only be responsible for ensuring a quality process and establishing mutual respect among parties.
- Nevertheless, conflict managers have a responsibility for assessing the chances of mediation producing an outcome that is fair to all parties – it is part of the mediator’s ethical obligation not to allow processes where poorer or less powerful people are taken advantage of. This includes weighing up potential benefits against the actual costs arising from participation in the process: time, money and other resources, as well as the resignation and passivity of weaker parties, which might result from failed attempts. The list of challenging and limiting circumstances may assist mediators in doing this weighing up.
- The “best alternative to a negotiated agreement” (BATNA) is an important consideration when deciding whether to negotiate or not. What would parties walk away to?
- A good and fair outcome does not necessarily require settlement of all the issues at stake. Even if full resolution is not possible, parties in conflict may still prefer a partial settlement or trial solution to having no solution at all.

HINTS This session can be combined with Session 5.1 “Different conflict management procedures”.

Attachment 5.4.A Factors influencing the negotiability of a case

Relevant criteria	Factors that support interest-based negotiations	Factors that pose a real limitation to interest-based negotiations	Issues to be checked/questions to be raised
Disputing parties and their relationship	Parties are interested in negotiations because they believe that the outcome will offer more than they would have achieved without negotiations There is interdependence among the parties	Future relationships are not of concern Lack of ongoing relationship or future contact among parties	Is the conflict a single-encounter dispute, or is it occurring in the context of an ongoing relationship?
Leadership/ authority	Participants have the authority to represent the constituencies they claim to speak for	The person or group who/that can make binding decisions is not present, or key role players are influenced or pressured to continue the conflict	Do the individuals and organizations have the necessary leadership?
Power and other means of influence:	Equal means of influence exist, or the party with superior power is willing to curtail the exercise of power and work towards a cooperative solution Parties are ready and willing to talk in good faith (resolution of the dispute is a high priority for all stakeholders)	Participants have no power and capacity to negotiate, or individuals are denied their fundamental rights Parties refuse to take part in the process. This often occurs when there are major power imbalances among parties and/or weak legal systems (absence of sanctions) Parties are unable to accept their own best interests (because they suffer from emotional or other blocks)	What power or means of influence do disputants have to make the other side give them what they want? What might happen to limit the party's power? What possible allies and other sources of power might the party be able to tap into?
Participation	Participation in the process is voluntary	Parties are forced to participate in the process	How did stakeholders get involved in the process?
Type of dispute	The conflict is negotiable (subject to a compromise solution) There are multiple issues, which allows for trading and negotiation	The conflict is intractable (resources are undividable and cannot be shared) There is a single contested issue, or the conflict is centred on clashes of values or denial of fundamental rights (identity) or needs (security, food security)	What are the different issues (substantive, relationship and procedural) in this conflict?
Costs	There is adequate time for negotiations	There is a deadline by which time an agreement must be reached	How long will it take to settle the dispute? Are there any critical deadlines or time constraints to be considered?

Source: Adapted from Moore, 2003.

SESSION 5.5 THE ROLE OF THE MEDIATOR

**PURPOSE:**

- to build participants' understanding of the role, skills and qualities of a mediator;
- to help participants consider whether they could be appropriate as mediators.

**TIME:** one and a half hours.**MATERIALS:** markers, flip charts.**PREPARATION:** copy on to flip charts:

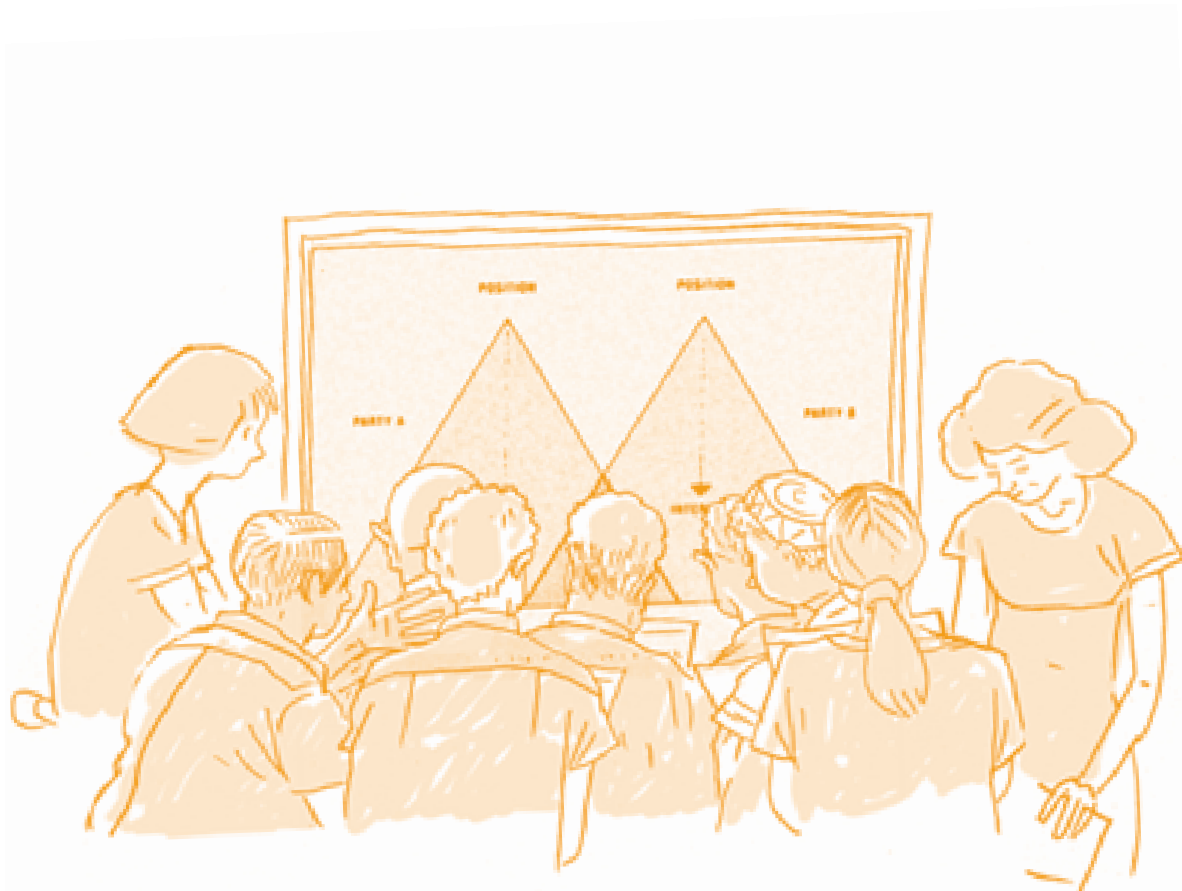
- Attachment 5.5.A “Definition of a mediator”;
- Attachment 5.5.B “Role of a mediator”, with each section (i, ii and iii) on a separate page or transparency;
- Attachment 5.3.C “Triangles diagram” (from Session 5.3).

**STEPS**

- 1 Explain that participants have already discussed what mediation is, and have reviewed the circumstances where consensus negotiations require a mediator. This session examines the role of a mediator more closely, and identifies the circumstances in which it may be appropriate for participants to act in this role.
- 2 Review the definition of a mediator and stress that mediators vary significantly in the ways in which they define their role and involvement in promoting successful negotiations. The main issue regards finding the appropriate focus – process, substance or relationships among the parties. This trainer's guide promotes a focus on the process and an impartial stance towards substance, for a variety of reasons. First, it is believed that it is the prime role of the mediator to guide people on the procedures, create the psychological conditions necessary for productive talks and move the process forward, from one step to the next. Second, parties should have the primary responsibility for self-determination because they are usually better informed than any third party could ever be, and when parties make their own decisions their commitment to implement and adhere to a settlement is enhanced.
- 3 Explain that a mediator is a facilitator specialized in conflict management. With the participants, review the two core features of a facilitator/mediator: content neutrality and process guidance. Content neutrality means not taking a position on the issues being discussed and not having a position or interest in the outcome. Process guidance means helping the conflict parties in their communication and decision-making processes by encouraging:

- full participation;
 - mutual understanding;
 - shared responsibilities;
 - inclusive solutions that incorporate everybody's views.
- 4 Ask participants for reasons why a facilitator/mediator needs to be content-neutral. Make sure that the following reasons are discussed:
- to support group ownership of the decision-making process, and hence the solution;
 - to encourage a creative thinking process;
 - to avoid being perceived as favouring one idea and taking sides;
 - to help find a solution that all can live with.
- 5 Refresh participants' memories about the six open-ended questions (why, what, how, who, when and where) introduced in Session 4.3 "Probing". Ask participants to think of a simple problem that has been bothering them: a difficult boss, giving up smoking, etc. Ask them to form pairs and to share their simple problems with their partners. They should take turns, one sharing a problem, and the other asking questions to help reach a solution. The questioners should use the triangle model (Attachment 5.3.C) to ask questions that help their partners to solve their problems for themselves. Under no circumstances is the questioner to give his/her own solutions.
- 6 After each person has had an opportunity to question and be questioned, reconvene the participants and ask:
- What happened? Was it easy or difficult?
 - Ask the questioner, what did you do to prevent your own ideas from filtering into your questions?
 - Ask the problem sharer, how did you feel as the person being questioned?
 - Did it help you to find a solution? If yes, how?
- 7 Introduce the concept of an independent mediator who is neutral and impartial. Check that the participants know what these terms mean and why they are important:
- *Neutrality* means that a party is not connected to, and has no prior relationship with, any of the disputants.
 - *Impartiality* refers to the absence of bias or preference for a party or a particular outcome.
- Explain that a mediator in a conflict needs first to assess how neutral or impartial she/he is. The role of mediator may be difficult or impossible for somebody who is involved in and affected by the conflict. Show the flip chart of Attachment 5.5.B (i) "Review what stake you hold" and ask participants to assess themselves against the questions.
- Point out that sometimes a person who has not passed the neutrality test may still be expected to act as a mediator. It is sometimes not feasible to find a truly neutral mediator. In such situations, the mediator needs to make a conscious effort to step out of the stakeholder role and to be as impartial as possible. Explain that in order to be successful as a mediator, participants need two major attributes: credibility, to be accepted in the role; and trust, to be seen as finding an unbiased solution.

- 8 Divide the participants into groups of four or five and ask half the groups to think about what provides credibility and the other half to think about what builds trust. Give them 15 minutes to do so.
- 9 After 15 minutes, reconvene the participants. Ask the groups working on credibility to call out their ideas, and note these on a flip chart.
- 10 Show the flip chart of Attachment 5.5.B (ii) "What confers credibility?", and discuss any of the suggestions that did not emerge from the group's discussions.
- 11 Repeat the process with the group working on trust, using the flip chart of Attachment 5.5.B (iii) "Ways of generating trust in the mediator".



Attachment 5.5.A Definition of a mediator

A mediator is a third party who helps the parties in a dispute jointly to develop an acceptable, voluntary and non-coerced solution to their conflict.

Attachment 5.5.B Role of a mediator

(i) Review what stake you hold

- Do you have a personal stake in how the conflict is resolved? For example, do you live in the affected area, or does your employment or security depend on a particular outcome?
- Does your organization have a history of working in the area, which requires you to work for a particular outcome? For example, have you worked with particular groups that you must continue to support, or have you put projects in place whose existence may be threatened by the conflict?
- Are you under pressure from partners, funders, government authorities or other agencies to work in a particular way or towards a particular outcome? What price might you pay for your neutral involvement?
- Positive answers to any of these questions suggest that you may not be able to provide a genuinely neutral intervention in the conflict.

(ii) What confers credibility?

- Your skills and actions.
- You have been recommended by a respected person.
- You are part of an organization that has experience of providing effective neutral interventions.
- You have access to influential people.
- Your age and demeanour.

(iii) Ways of generating trust in the mediator

- Exercising good listening skills, and demonstrating that you can hear contradictory points of view without taking sides.
- Making explicit statements about the actions you intend to take during your intervention, and not acting contrary to those statements.
- Keeping your word and building a pattern of consistent behaviour.
- Not abusing or betraying confidential information.
- Demonstrating commitment to work with the parties for as long as it takes, or managing your withdrawal in a way that does not leave the parties worse off than before.

SESSION 5.6 A MAP OF THE MEDIATION PROCESS



PURPOSE: to provide participants with an overview of the complex mediation process.



CROSS REFERENCE: Section 3.2.



TIME: one and a half hours.



MATERIALS: flip charts, coloured pens, envelopes.



PREPARATION:

make an enlarged copy of Attachment 5.6.A “The steps of the mediation process” for each group of three participants, large enough to be seen clearly when posted after the group discussion. Cut each copy into strips – one for each step – and place each set of strips in an envelope. In each envelope, include a few blank strips, for participants to suggest additional steps.



STEPS

- 1 Start by explaining that now they know what interest-based negotiations are, and are familiar with the roles and responsibilities of a mediator in assisting parties in interest-based negotiations, the participants are going to look at the entire mediation process by drawing a conflict management process map that outlines the key steps and considerations. Such a map can be used to keep on track and move the process forward towards successful outcomes.
- 2 Divide the participants into groups. Explain that each group will be given an envelope that contains slips of paper with key steps and important principles to be considered in the process of mediation. The groups should read through and discuss these steps and considerations to ensure that they understand the meaning of each. As a group, they have to:
 - differentiate between key steps and principles;
 - define sub-steps for each of the steps, based on their own experiences of working to resolve disputes among parties.
- 3 On a flip chart, each group is to draw a circle and arrange the ten steps in a logical order. The considerations should be placed in the centre, in order of importance. Stress that there are no right or wrong answers in this activity, but groups will have to justify the choices they make. Explain that if participants feel that an essential step or condition is not included in the envelope, they can write it on one of the blank slips of paper provided and add it to their map. When the group members are satisfied with the order of the steps, they should stick them in place with the glue stick. They have 45 minutes to complete the task.






- 4 After 45 minutes, reconvene the participants and ask each group to post its flip chart. Allow a few minutes for all the participants to look at each others' results. After they have had a chance to do this, initiate a discussion around the following questions:
 - What differences or similarities were there among the groups' maps, and why?
 - Did any group add its own conditions or steps? What were these? Why did the group consider these important?
 - How useful was this process in helping to share experiences and understand other people's perspectives? Point out that many of the considerations are very important for successful negotiations; one of the purposes of ranking is to generate discussion.
- 5 Wrap up the session by emphasizing the following key learning points.

**KEY LEARNING POINTS**

- In reality, a mediation process is not as straightforward as the map suggests. What matters most is to find an appropriate process that responds to the specific issues to be addressed. In some cases, detailed data collection may be required to understand causes and dynamics, while in other cases, a joint interview with parties at a joint meeting is sufficient.
- It is important to consider the complexity of the dispute to determine the initiative and level of intervention required. Sometimes parties need minimal help, at others they need help on all sorts of issues. At the end of the day, the map should be understood as a process of joint education and development of mutual understanding.
- Clear procedural descriptions are necessary (in training and in real life) to demonstrate how the procedure might work and for parties to make informed judgements about the viability of the process.

HINTS This session will be easier for participants who have previously been exposed to Session 3.2 “Introduction to rapid conflict assessment”.

Attachment 5.6.A The steps of the mediation process


Preparing for entry
Entering the conflict scene
Conflict analysis
Broadening stakeholder engagement
Assessing options
Preparing for negotiations
Facilitating negotiations
Designing the agreement
Monitoring the agreement
Preparing for exit
Fostering collaboration
“Do no harm”
Restoring relations
Managing information
Capacity building of weaker parties









SESSION 5.7 MEDIATION MEETING – INITIAL STAGES

 **PURPOSE:** to give participants practice in conducting the opening phases of a mediation meeting.

 **CROSS REFERENCE:** Section 7.3.1.

 **TIME:** three hours.

 **MATERIALS:** pin boards, cards, coloured marking pens, tape.

 **PREPARATION:**

- photocopy Attachment 5.7.A “Instructions for the facilitator/mediator – initial stages”, Attachment 5.7.B “Instructions for conflict parties” and Attachment 5.7.C “Instructions for observers” for each participant;
- make appropriate numbers of copies of the background information and role instructions for one of the case studies in Chapter 6.

STEPS

- 1 Introduce the session by explaining that the activity is the first in a series of three step-by-step mediation exercises. Participants will have a chance to practise the mediator’s role and facilitate the opening phase of a mediation meeting. Explain that this will be done through the use of role play.
- 2 Explain that participants will be divided into groups. All the groups will role play the same situation simultaneously, with some people observing. Each person will receive a slip of paper with her/his instructions for the role play. Participants should not share these instructions with the other members of their group. In each group, one person will play the mediator’s role, with the others playing the various conflict parties. Explain the role and tasks for the mediator (Attachment 5.7.A).
- 3 Give participants an example of how to identify the parties’ interests (Attachment 5.7.A step 6). Explain that the mediator has to select one party to begin with, before going round all the other parties, giving each of them a turn.

The mediator then has to summarize each party’s issues to confirm that they have been properly understood. If issues are not yet clear, the mediator has to probe by asking questions to elicit more information about issues and interests. The mediator should ask whether the party would like to add anything else. If not, the process should be repeated with the next stakeholder.

Once all of the parties have provided some background on the issues and elaborated on their interests, the mediator summarizes the issues and determines the sequence in which they should be addressed.

Before closing the first meeting, the mediator should seek agreement about where and when the parties will meet again.

- 4 Assign the participants' roles for the role play. Along with the role instructions for the case study selected (which should each be distributed to all the people playing that role), distribute the case study background material and copies of Attachments 5.7.A, 5.7.B and 5.7.C to each participant. If there are more participants than roles, the remaining participants can serve as observers.
- 5 Stress that the effectiveness of the role play depends on how effectively participants enter into their roles. Role play instructions describe only what to talk about; participants have to add personality and feelings. They should play their roles realistically, but not so hard that a mediator – no matter how good – will never be able to reach agreement (“Don't eat the mediator!”).
- 6 Divide the participants into groups according to the roles they are to play (facilitators in one group, community representatives in another, etc.) and give them 30 minutes to discuss and prepare for the role play.
- 7 Reform the groups so that each consists of one mediator and one representative from each stakeholder group.
- 8 Have the mediators begin the opening phase of the groups' discussions, according to their instructions.
- 9 When the groups have completed their mediation sessions, reconvene the participants.
- 10 Initiate a discussion with the following questions:
 - *Ask the mediator:* How he/she felt about her/his opening statement – strengths, weaknesses and anything missing?
 - *Ask conflict parties:*
 - What was the impact of the mediator's opening statement on them, its strengths and any suggestions for modification or improvement?
 - Were procedural guidelines or ground rules developed? How? Was this helpful?
 - Did the mediator succeed in creating a favourable atmosphere for the meeting? How did he/she achieve or fail to achieve this?
 - Were the roles, functions and responsibilities of the mediator and participants made sufficiently clear?
 - Did the mediator identify issues clearly? How helpful were her/his questions?
 - *Ask observers:*
 - How was the agenda developed?
 - What was the logic for the placement/sequencing of issues?
 - Did the sequencing succeed in moving parties forward?
- 11 Wrap up the session by emphasizing the following key learning points.

KEY LEARNING POINTS

- When **framing the issues**, it is very important that the mediator restate each issue in a way that makes people with different views willing to talk about it. It is also important to be as inclusive as possible and list the issues of all, and not just of some, of the parties.
- When developing a negotiation/mediation agenda, the mediator should:
 - summarize the collective issues and interests expressed by each party;

- frame the issues in neutral and positive terms;
- frame the issues as a list for future discussion;
- avoid attributing topics to specific parties;
- ask the parties whether they would like to address anything else at the meeting;
- obtain the parties' general agreement on the final list of issues to be discussed;
- think about how to sequence the issues in a way that is likely to result in early agreement among the parties.

HINTS Ideally, participants should receive their role play scripts the evening before the session, and all those who are to play the same role should meet in advance to identify the main issues and interests. Mediators meet to talk about the mediation strategy.



TRAINER'S NOTE 5.7.A ROLE PLAY CHALLENGES

Check that participants are familiar with role plays/simulations. If some are not, explain that the purpose of role play is to practise in a safe environment that is based on a real-life setting to provide the opportunity for learning from trial and error. The following challenges/mistakes are quite common and should be noticed and corrected by the trainer:

- The mediator is too controlling or passive.
- Parties become emotional or disruptive.
- The mediator's questions provoke unproductive or unhelpful positions.
- The second party becomes anxious or stops listening when the first party comments.
- The second party rebuts what the first party has said.
- The parties start to jump to solutions and debate them.
- The mediator is working harder than the parties.
- The mediator forgets to make an opening statement and starts without laying the groundwork for mediation.
- The mediator "monologues" or uses jargon, instead of conversing.
- The mediator or the parties talk for too long.
- An important factor is left out.
- The mediator tests the parties.
- The mediator is perceived as taking sides.

Attachment 5.7.A Instructions for the facilitator/mediator – initial stages

You will facilitate the opening phase of a mediation meeting.

The *purpose of the first meeting* is to:

- enable parties to feel that they are being listened to;
- help parties to express and acknowledge their feelings productively;
- identify the issues to be addressed;
- bring to the surface any issues that have not yet been identified.

The following are the tasks for facilitating the first meeting:

1. Introduce the purpose of the first meeting.
2. Introduce yourself and your role as a facilitator/mediator.
3. Explain the mediation process.
4. Identify and agree on behavioural guidelines for the group.
5. Obtain all parties' commitment to beginning the process, and check on how much time everybody has for the meeting.
6. Define the issues and interests of each party clearly.
7. Draw up a joint list of all the problems or issues that the parties wish to talk about.
8. Set and prioritize the agenda.
9. At the end of the meeting, seek the parties' agreement about where and when to meet again.

1 Introduce the purpose of the first meeting. Welcome everybody. Explain the purpose of the meeting. Without going into details, state the main issues in a neutral and unbiased way. This statement should be more:

issue-oriented	than	person-oriented
positive	than	negative
optimistic	than	pessimistic
future-oriented	than	past-oriented
goal-/solution-oriented	than	cause-oriented

For example:

“Welcome, we are meeting today to reach a consensus agreement on the management of the protected area [or on whatever the issue/conflict to be discussed concerns]. There are disputed issues and open questions to discuss. If we discuss the issues and open questions in an open and constructive atmosphere, I am sure that we will come up with solutions that meet the interests of all stakeholders.”

2 Introduce yourself and your role as a facilitator/mediator. Give a short explanation, ensuring that you:

- introduce yourself briefly (name, background);
- thank participants for accepting you as a mediator/facilitator;
- explain that as a facilitator/mediator you are neutral, i.e., you are not biased, do not have your own agenda and are not on the side of one of the groups of stakeholders;
- assure participants that you will observe strict confidentiality regarding statements and behaviour;
- explain that your role is to steer the discussion process and not to find a solution;
- explain that you will assist participants in meeting their objectives by:
 - keeping the group to the time schedule;
 - recording its interests and decisions on a flip chart;
 - ensuring that everyone has equal time to speak;
 - assisting the stakeholders in categorizing their issues;
 - ensuring that they have considered how to implement their agreements.

3 Explain the mediation process. Describe the procedures to be followed. For example:

“I suggest that we begin the discussion today with each of you giving a brief description of the situation and the issues that have brought you to mediation. This will inform all of us about the issues you want to discuss. Each of you will have a chance to present your views for about ... minutes.

“During your presentations, I may ask some clarifying questions and I may make notes to record the main points/issues/concerns for the agenda.”

4 Identify and agree on behavioural guidelines for the group. Have the participants list what ground rules they think are needed. Provide the following as examples:

- Each person should contribute equally to the discussions.
- Listen carefully and attentively.
- Delay questions or comments until the speaker has finished. When making comments, do not use insulting or abusive language.
- Try to understand and respect each others' viewpoints and concerns.
- Make your own interests, feelings and concerns clear.
- Present your concerns from your own subjective point of view – do not claim to possess objective knowledge.
- No final decisions will be made until there is full agreement.

Record these ground rules and add the additional ones introduced by participants. Refer to the rules as necessary throughout the meeting.

5 Obtain all parties' commitment to beginning the process, and check on how much time everybody has for the meeting. Answer any questions that the parties have about the procedure to be followed. Gaining a commitment to start mediation is the mediator's last move before turning the session over to the participants.

6 Define the issues and interests of each party clearly. Start to identify and clarify the parties' interests. Select one party to begin with. For example:

"We would now like to hear from each of you the history of the current situation and some of the issues that you would like to discuss in future talks. When you present your views, please refrain from putting forward positions or possible solutions until such time as we all understand the issues that need to be discussed and the problems or conflicts to be addressed and resolved. Would you [turn to a conflict party] be willing to begin? Can you explain why you are here, and the history of the situation that you want to address? Please tell us about the issues or topics that you would like to discuss. What is important to you about that issue? What does it help you achieve or gain, and what interests or needs are important?"

Document the participants' points on cards on a pin board, or write them on a flip chart. Then summarize each party's issues to confirm that they have been properly understood. If issues are not yet clear, probe by asking questions to elicit more information about issues and interests. Ask whether the party would like to add anything else. If not, the process should be repeated with each of the other stakeholders in turn.

Note: The critical task facing mediators at this stage is to gain an understanding of each party's interests. Parties in dispute rarely identify their interests clearly and directly. This lack of clarity occurs because parties:

- often do not know what their genuine interests are (because interests are equated with positions);
- intentionally hide their interests (because they fear they may receive less if their needs are known);
- lack awareness of the procedural approaches for uncovering interests.

Facilitators may therefore need to assure parties that understanding interests can lead to more productive and satisfying outcomes. The first step towards achieving this is to create awareness that:

- all parties have interests and needs that are important and valid to them;
- every problem has more than one solution;
- a solution can be found that meets the maximum number of interests of each party.

7 Draw up a joint list of all the problems or issues that the parties wish to talk about. After all the participants have spoken, give an overview of what they have said and ask whether all the issues raised are included in the listed agenda points. Have participants add points if necessary. It is important to be as inclusive as possible and to list the issues of all, and not just some, of the parties.

Note: If agenda items are formulated in a biased and aggressive way (blaming or attacking other participants), reformulate them in a diplomatic way: the original content of the message is kept, but the form is neutral and acceptable to the other stakeholder groups (see Session 4.9 Reframing).

8 Set and prioritize the agenda. The sequence of issues for discussion can be set by the mediator or the parties. Mediators usually suggest the agenda when:

- parties are likely to argue about which issue to discuss first;
- parties want to discuss the most difficult issue(s) first;

- parties demand preconditions or claim that an issue is non-negotiable;
- one party refuses to discuss another's issue;
- mediators believe that parties are so embroiled in the conflict that they may not be able to sequence the issues productively, or they may not have considered the possible logic or rationale for ordering discussion topics.

In more relaxed circumstances, mediators can turn agenda sequencing over to the parties, to give them control of the order of topics, or when order is not important:

- Explain that to come up with a tentative agenda it is important to classify the agenda points.
- Make four headings on the flip chart: high priority; medium priority; low priority; and undecided.
- Ask the participants to establish criteria by which they will determine high-, medium- and low-priority issues. For example, in terms of short- or long-term impacts, the people affected, or the resources required.
- Ask them to categorize their agenda items under one of the three headings of high, medium and low priority. They should use their criteria as guidelines. Ask clarifying questions as needed, such as: *"What are your central reasons for ranking this as a high priority?"*
- If there is disagreement on where to place an issue, suggest one of the following:
 - *"Given the lack of agreement on where to place this issue, can we put it under undecided for the time being? Later, we can come back to it for further discussion".*
 - *"Having discussed this point, are you all in complete agreement that this item is a low priority?"*
- When all of the issues have been placed into their respective categories, address the undecided issues and ask the participants how they want to work with these. Suggest options such as changing the wording, addressing the issue in a different forum, or agreeing not to discuss it at all.
- Then ask them to rank the issues within each category, from the highest to the lowest priority.

Hints for sequencing agenda issues

Put easier topics early in the agenda. Defining the entry point for talks is an important decision: the starting point can have an impact on all the other issues in the conflict. (A useful analogy is with acupuncture, in which practitioners have to identify the point to treat in order to induce a change somewhere else.) The following points should be considered when selecting the entry point for talks:

- It should be an issue that is important to everybody, but not so complicated that it takes a long time to resolve.
- Starting with a procedural or psychological agreement is a good strategy. For example, an apology when another party is willing to forgive sets the scene very well.
- It is also helpful to prioritize the issues that need to be resolved immediately, and then move on to those that can be resolved later.

Try and get a few easy agreements first before tackling the more difficult issues. This helps to build a "habit of agreement", and also encourages parties to reach agreement on harder issues so as not to jeopardize these earlier "easier" agreements.

Good entry points are:

- easy issues that are important to all parties and on which agreement can be achieved rapidly;
- agreements on general principles, which can shape or direct agreements on later issues;
- foundation issues, which form the basis for discussion of future issues;
- key issues, the resolution of which will make agreement on later issues easier to achieve;
- linked issues, which may need to be discussed together or concurrently.

Bad entry points are:

- issues that stakeholders are unwilling to discuss in public;
- issues that are important to some stakeholders, but not others;
- issues that are important for all stakeholders, which might make good starting points for tasks rather than talks.

9 At the end of the meeting, seek the parties' agreement about where and when to meet again. So far, the parties have clarified issues and identified common and conflicting interests. In the next meeting the central task of the negotiating parties and the mediator is to develop mutually acceptable options for agreement and settlement.

Before closing the first meeting, seek agreement about where and when the parties will meet again.

Mediators should remember...

How you speak matters as much as what you say; this is the beginning of building trust and credibility in you as a facilitator and in the process. You need to set a positive and optimistic tone.

Preparation for the first mediation meeting involves the following tasks:

- Prepare your opening statement. Consider how to open negotiations in a way that sets a positive tone and promotes interest-based problem solving.
- Develop your initial strategy for eliciting parties' issues (the topics they want to resolve) and interests (their needs, wants, fears and concerns).
- Think about strategies for dealing with the strong emotions that may emerge during the first joint working session.
- Consider how to move parties from a proposal/counter-proposal or debate process to a deeper discussion and understanding of issues and interests.
- Consider how to divide your role and responsibilities with a co-mediator.
- Identify your interests as the mediator.

Attachment 5.7.B Instructions for conflict parties

- Work in negotiation teams to discuss and define the issues you wish to raise, and the options that you and the other parties can consider.
- Consider the interests (needs, wants, fears and concerns) connected to the issues (topics) you wish to discuss in negotiations.
- Decide whether you should negotiate or not. What would you walk away to (what is your best alternative to a negotiated agreement)?
- Develop an opening statement. This is an opportunity to practise interest-based negotiation skills. Your aim is to get your critical interests addressed/satisfied. What kind of opening statement should you prepare to make satisfaction of your needs and concerns likely?

Think about how you wish to sequence the topics, and which issue to start with.

Attachment 5.7.C Instructions for observers

Your task is to observe the meeting and provide feedback to the mediator about her/his performance. Please consider which of the mediator's actions and behaviours help the parties to discuss their problems or issues. What changes would you suggest?


Please note your observations during the mediation meeting by considering what the mediator does to:

- direct communication from the stakeholders/parties to him/herself;
- listen attentively, providing a model of respectful behaviour;
- provide assurance to the non-speaking parties, for example through periodic eye contact;
- enforce the agreed ground rules when necessary;
- ensure that everyone has enough information by asking probing or clarifying questions to draw speakers out;
- name and acknowledge feelings;
- make the issues and interests identified easier to talk about by restating or paraphrasing them;
- reframe positional or adversarial comments into statements about the parties' interests;
- summarize the critical parts of long, complicated or convoluted descriptions and explanations.

Note: When sharing your observations, remember that feedback is a way of helping another person understand the impact her/his behaviour has on others. Feedback is most effective when it is constructive. The following table provides some hints for constructive feedback.

Criteria	Bad example	Good example
Focus on the positive	You don't smile enough	You have such a warm smile. You could use it more often, it makes people feel good
Focus on behaviour, not the person	You are arrogant	I saw that you often turned your attention to the next speaker before the current speaker had finished speaking
Be specific, not general	You are always so talkative	When we were deciding about issues, you talked so much that I stopped listening
Be descriptive, not judgemental	You want to appear important	Having your mobile phone ringing disrupts the flow of discussion


SESSION 5.8 MEDIATION MEETING – MIDDLE STAGES

 **PURPOSE:** to give participants practice in conducting the middle phases of a mediation meeting, when options for settling the dispute are identified and assessed.

 **CROSS REFERENCE:** Sections 7.3.2 and 7.3.3.

 **TIME:** three hours.

 **MATERIALS:** pin boards, cards, coloured marking pens, tape.

 **PREPARATION:**

- photocopy Attachment 5.8.A “Instructions for the facilitator/mediator – middle stages”, Attachment 5.8.B “Example of an agreement in principle” and Attachment 5.8.C “BATNA guidelines” for each participant;
- ensure you have sufficient extra copies of the role instructions from the selected case study for participants who will be changing roles.

STEPS

- 1 Explain that this session builds on the previous, first mediation meeting. Participants will return to their small groups and continue the role play, but each group should appoint a new facilitator to give as many participants as possible the chance of practising mediation. The remaining group members will each take on the role of one of the conflict parties. The role plays continue according to the agreed agenda for discussing the issues. This time, the task is to generate and evaluate possible solutions.
- 2 Explain that the mediator is not responsible for finding a solution. This is the responsibility of the parties. The role of the mediator is to ensure that the parties think creatively about solutions rather than reverting back to their positions. One step in this direction is to remind parties about their best alternatives to a negotiated agreement (BATNAs, Attachment 5.8.C). If negotiations cannot come up with a solution that all are happy with, what are the next best options?
- 3 Developing a safe and creative environment for option generation involves the following steps:
 - With the parties, review the issues that they want to find solutions for. Explain that options will be generated for one issue at a time.
 - Explain why it is important to generate multiple options. It is quite common for party x to suggest an option that party rejects. Several options need to be listed to broaden the discussion.

- Initiate a brainstorming of ideas to generate options. Make it explicit that parties do not have to agree to any option that is suggested at this point. The generation of options is separate from the evaluation of options.
 - Restate a joint problem solving statement that includes all the different parties' interests.
- 4 Explain the different ways of coming up with solutions for agreement:
- *Standards and criteria*: for example, ask for standards that would be reasonable to all parties. These should be reformulated to form the criteria on which to base future decisions.
 - *The status quo*: consider what aspects of the parties' relationship are currently working, and include these in the agreement. Seek mutually acceptable and fair standards and criteria for framing the agreement
 - *Agreements in principle*: Start with general principles that all parties can agree to. Then work on clarifying how these principles can be put in place to lead to an agreement (see Attachments 5.8.A and 5.8.B for examples).
 - *The building block approach*: break down the overall problem into several smaller problems, and put these together to get an agreement.
 - *Links and trades*: to solve one problem, link it to another. If a local community wants compensation and jobs, a company can offer a set number of jobs as part of a compensation package.
 - *Procedural solutions to substantive problems*: for example, a company has cut a lot of trees in the water course, and water quality has declined. To reduce runoff, the community wants large numbers of certain types of tree to be planted in specific places. The company thinks that this would involve a lot of unnecessary effort, and disagrees with this solution. Instead of finding one solution, the company and the community therefore need to find a process for tackling the restoration issue. Start by implementing the company's suggested solutions, but have both the company and the community monitor the water quality. After a season of implementing the company's solution, if the water quality has not improved, the company should increase its re-vegetation efforts. This procedural process is useful when the parties cannot find an answer to their problems.
 - *Vision building*: this means getting the parties to imagine the future and working back from that vision. For example, a future vision sees that in five years time, a joint forest management plan will have established good working relations, improved forest health and better economic outcomes for the community. If all the parties want this, they can work backwards from the vision, defining the steps required to get there.
 - *Model agreement*: past successes from other areas can be used to build/revise a suitable agreement for the current case.
 - *Single-text document*: this is effective when some parties cannot read. The mediator listens to all the possible options and writes a draft. One by one, the parties add to or change the draft so that it works for them, until the document works for everybody.

- 5 Explain that the mediator should help parties to move from option generation to agreements by asking them to identify:
 - options that are acceptable, but not necessarily perfect, which will be discussed further;
 - options that are totally unacceptable, which should be laid aside for possible consideration later if the more viable ones do not work out.

The mediator should then ask what the parties like about the preferred options – strengths, satisfaction of interests, etc. – and whether there are any problems with them. If there are no problems, ask whether the parties can accept and agree to them as proposed. If they can, affirm and restate their agreement. If there are problems with the option(s):

 - ask the parties to identify what they are, and what interests, concerns or needs are not being met;
 - conduct problem solving on these;
 - help parties to see what they can gain from finding a workable option;
 - if necessary, present two possible options for their consideration.
- 6 Clarify participants' questions. Then divide the participants into groups according to their roles: all the facilitators meet in one group, the community representatives in another, etc.
- 7 Hand out the new instruction sheet for facilitators (Attachment 5.8.A) and new copies of the conflict parties' role instructions as required. Allow 30 minutes for the groups to read through the material and discuss their approach to the negotiations as interest parties or facilitators.
- 8 After half an hour, have the participants move back into their mixed-role groups to continue the role play from the previous session. Give them two hours for this.
- 9 After two hours, reconvene the participants. Ask one person from each mixed-role group to summarize what happened within that group.
- 10 Initiate a discussion around the following questions:
 - What options were generated?
 - How did the groups' solutions differ?
 - Which approaches were used for moving from options to assessment of solutions?
 - Were there any difficulties? If yes, explain.
 - Which decision-making method was most commonly used to assess options?
 - What kind of results would you expect if you used consensus in your selection of solutions?
 - What kind of results would you expect if you agreed to vote or bargain?
 - Do you think that there would be a difference in the sustainability of the solutions if you chose one method over another?
 - Did any group use a combination of methods? What were the advantages or disadvantages of doing so?



TRAINER'S NOTE 5.8.A BATNAs

The purpose of negotiating is to produce a better result than would have been obtained without negotiation. The best alternative to a negotiated agreement (BATNA) is the consideration of alternatives in case negotiations fail: What are the possible alternatives that could be pursued if no agreement is reached? What are the practical implications of these alternatives? What results might be achievable through other arenas?

Disputing parties derive some of their negotiation power through their BATNAs. The BATNA is the standard against which every result should be measured. If parties have strong BATNAs, they can easily reject an agreement that does not satisfy their interests well. If they have weak BATNAs, they might accept the same agreement knowing that this is the best possible outcome given the alternatives. If parties in conflict do not know what their BATNA is, they might be either too optimistic, and reject agreements that it would be in their interest to accept, or too pessimistic, and accept agreements that are unfavourable and worse than what could have been achieved without agreement.

It is also a good idea for each party to consider other parties' BATNAs in order to learn as much as possible about their power in the negotiation, relative to its own.

Attachment 5.8.A Instructions for the facilitator/mediator – middle stages

You will facilitate the search-for-solutions phase of a mediation meeting.

In this phase, the central task of the mediator and the negotiating parties is to develop mutually acceptable options for agreement and settlement.

To fulfil this task the following steps are required:

1. Ensure that parties understand the need to develop multiple options for settling the dispute.
2. Select a specific issue to discuss.
3. Generate settlement options for this specific issue.

1 Ensure that parties understand the need to develop multiple options for settling the dispute. Explain why it is important to generate multiple options (see the section on Brainstorming). It is quite common for party x to suggest an option that party y rejects. Several options need to be listed to broaden the discussion.

2 Select a specific issue to discuss. Explain to the participants that they are to decide which of the issues discussed in the previous session to discuss. In this session, they will work on identifying and assessing solutions to this issue.

Post the results from the previous activity (opening meeting) with the list of issues and their rankings (high, medium or low priority).

Have the participants agree the first issue they want to address.

3 Generate settlement options for this issue. Explain that the interest parties need to generate options/solutions. There are several methods a mediator can use for coming up with solutions for agreement. Four of these are described in the following.

Standards and criteria

Step 1. Ask for standards that would be reasonable to all parties. These should be reformulated to form the criteria on which to base future decisions. Ask the participants to define criteria for a good solution: “What would a good solution include, and what should it exclude?” Work with parties to come to an agreement on the criteria. Record these on a flip chart.

Developing and using criteria may help the process of deciding which options are most likely to be satisfactory to all groups. It also ensures that there are fair standards for decision-making. Have the group suggest suitable criteria. These may vary and can include:

- general achievability;
- cost and inputs;
- time scale;
- advantages (pros) and disadvantages (cons);
- opportunities and risks.

Step 2. Next, options are assessed against these criteria. A decision grid (see below) can help the analysis and comparison of alternative solutions through the help of indicators.

Criterion/option	Option 1	Option 2	Option 3
General achievability			
Cost and inputs			
Advantages (pros)			
Disadvantages (cons)			
Opportunities			
Risks			

Step 3. As each solution is checked against the criteria, the group members should decide whether they agree to:

- keep it (it looks acceptable);
- throw it away (it is not at all acceptable); or
- hold on to it for further discussion.

Step 4. Record the participants' decisions on a chart under the headings: "Keep", "Throw away" and "For further discussion"

Agreements in principle or the formula approach

Another possibility is to start with general principles that all parties agree to. Here the mediator needs to reframe the central issue in broader terms and encourage the disputing parties to generate general principles of agreement (see example below). Through reaching a series of agreements in principle on several levels, the parties can clarify how these principles can be put in place to lead to an agreement. For example:

- *General problem:* How can we make sure that local people have equal chances of finding employment with the companies, compared with workers from outside the area?
- *First agreement in principle:* The companies and the community agree in principle that the companies should employ more local people.
- *Second agreement in principle:* The companies and the community agree in principle that those hired should have certain qualifications or skills.
- *Third agreement in principle:* The companies and the community agree in principle to develop a list of specific qualifications and skills that those employed must have. These are listed in the resultant agreement.

Attachment 5.8.B Gives another example of an agreement in principle

Note: The mediator is not responsible for finding a solution. This is the responsibility of the parties. The role of the mediator is to ensure that the parties think creatively about solutions rather than reverting back to their positions.

Building block approach

The building block approach requires dividing an issue into sub-issues or components. These smaller components are usually more manageable tasks for problem solving. Options are then generated to address each sub-issue.

Issues are divided into sub-issues because:

- disputants may see and understand smaller issues more easily than those that are complex and multi-faceted;
- dividing issues may depoliticize or isolate specific issues that prevent settlement.

Brainstorming

Brainstorming is a powerful tool through which people can generate a variety of options for consideration. The mediator begins the process by framing the issue as a “problem”. Problems are often stated as “how” questions, such as how can an important cultural site be maintained while still allowing companies to explore for minerals?

The mediator should make it clear that parties do not have to agree to any option that is suggested at this point. The generation of options is separate from the evaluation of options.

The key rule in brainstorming is that any idea generated by anybody is worthwhile and should be listed. In brainstorming, generating ideas is strictly separated from evaluating them. The objective is to be creative, to move beyond usual patterns of thinking, and to widen the options, even if some of them seem strange at first. Options can be prioritized and reduced through other tools later.

Brainstorming guidelines

Brainstorming is a tool to generate multiple ideas, usually in a short time. It allows a number of possible choices to emerge. Unexpected solutions can be proposed that might not have been considered, and yet may have a key part to play in building a solution. Brainstorming works with the following rules:

- Any idea is better than none.
- Be creative and imaginative.
- Be forward thinking.
- Do not make critical comments or evaluate ideas.

Remember:

- As the mediator, your goal is not to define a solution but to practise good interest-based problem solving for mediators and negotiators.
- Options will be assessed at the next meeting.

Attachment 5.8.B Example of an agreement in principle

Taken from in Case study 6.1

General problem: How can we address, lower and – ultimately – eliminate actual and potential violence involving people shooting at each other in the forest?

First agreement in principle: “We all agree that it is important to both the companies and the community to stop the shooting incidents and violence.”

Second agreement in principle: “We agree that stopping the shooting incidents will demonstrate each party’s willingness to address an important issue of concern to both of them, and will lay the groundwork for discussing other issues of mutual importance.”

Third agreement in principle: “We agree that each group – the companies and the community – needs to educate and control its respective employees/members to prevent the incidents.”

Fourth agreement in principle: “The companies and the community will each agree to conduct periodic educational/briefing sessions for employees and community members at which leaders from each group will publicly announce these agreements and their intention to stop the shooting incidents. These meetings will be attended by leaders from all concerned groups.”

Fifth agreement in principle: “The companies and the community agree to develop a joint monitoring, investigation and complaint resolution process – the procedure for which will be determined in the near future – to address any problems in implementing the agreements and to promote joint compliance.”

Source: Moore, personal communication.

Attachment 5.8.C BATNA guidelines

Review the conflict:

- What kind of outcome do I hope to achieve?
- Which actions would best help me reach that objective?
- What are the potential outcomes with that method:
 - the best outcome?
 - the minimal outcome?
 - the worst outcome?

Assess the alternatives:

- Are there any issues that I am unwilling to negotiate?
- What alternatives do I have for satisfying my interests if we do not reach an agreement?
- What would be the best alternative?


Strengthen the BATNA:

- What can I do to improve my chances of getting my interests satisfied?
- Are there additional resources that may be required?
- Will I need extra time or financial support?

Consider the other parties' BATNAs:

- What do I think their key interests might be?
- What might they do if we do not reach an agreement?


SESSION 5.9 – MEDIATION MEETING – FINAL STAGES

 **PURPOSE:** to give participants practice in conducting the final phases of a mediation meeting.

 **CROSS REFERENCE:** Sections 7.4 and 8.2.

 **TIME:** two hours.

 **MATERIALS:** pin boards, cards, coloured marking pens, tape.

 **PREPARATION:**

- photocopy Attachment 5.9.A “Instructions for the facilitator/mediator – final stages” and Attachment 5.9.B “Settlement agreement checklist” for each participant;
- ensure you have sufficient extra copies of the role instructions from the selected case study for participants who will be changing roles.

STEPS

- 1 Explain that this session will build on the previous session by providing an opportunity to practise finalizing an agreement among the conflict parties. Explain that there are two major steps in this session:
 - packaging solutions and developing the implementation, monitoring and review procedures;
 - deciding how the agreement will be presented and acknowledged in its final form.
- 2 Explain that the role of the mediator in this is to:
 - help parties reach psychological closure;
 - help parties to develop viable and effective implementation and monitoring procedures;
 - encourage compliance with and ensure enforcement of agreements.
- 3 Explain that negotiated settlements are more prone to violations than are conflict resolution procedures with strictly defined implementation procedures. In part, this is owing to misunderstandings that result from poorly defined compliance criteria and steps. Mediators therefore need to encourage disputants to design criteria and steps carefully for use in implementing their decisions.

The criteria for evaluating implementation steps are similar to those used for evaluating the effectiveness of a substantive settlement. Implementation steps should be:

- cost-efficient;
- simple enough to be easily understood, yet detailed enough to prevent loopholes that cause new procedural disputes;
- realistic in their demands or expectations of parties;
- able to withstand public scrutiny of standards of fairness.

- 4 Explain that a negotiated settlement endures not only because implementation plans are effectively structured, but also because parties are psychologically and structurally committed to the agreement. Mediators therefore need to be particularly concerned in this last phase of mediations, to build in structural and psychological factors that will bind the parties to complying with the terms of the negotiated settlement. Such “commitment-inducing procedures” can be voluntarily, such as exchange of promises in the presence of authority figures, symbolic exchange of gifts, or informal or formal written agreements. Other commitment procedures are externally induced, such as legal contracts. What is required for a negotiated agreement to become enforceable under law depends on the laws and rules of the legal jurisdiction in which the agreement is promulgated, and the forms that a contract can take. Verbal agreements are sometimes included, especially when made in the presence of a witness. In addition to the contents of the agreement, the way the settlement is written can make a difference in its acceptability and later compliance. There are four factors to consider when drafting agreements (Moore, 2003):
 - clarity of the clauses: to preclude the possibility of diverse interpretations and misinterpretations;
 - degree of detail in the clauses: the more precise the terms of settlement, the less likely that interpretation conflicts will arise;
 - the balance of concessions: refers to the equity (not necessarily to equality of number) of the exchanges made by the parties;
 - the positive attitude and perspective represented: a final settlement has to reflect that it is an affirmation of the willingness and ability of the parties to cooperate.
- 5 Explain that participants will return to their small groups to continue the role play. Each group is to have a new facilitator. The remaining group members will each take on the role of one of the different interest parties.
- 6 Hand out the new instruction sheets for facilitators (Attachments 5.9.A and 5.9.B). Ask the participants to return to their mixed-role groups for the role play. Explain that they have one and a half hours for this.
- 7 After an hour and a half, reconvene the participants. Ask one person from each mixed-role group to summarize what happened in that group.
- 8 Initiate a discussion around the following questions:
 - How does the agreement look?
 - What difficulties were encountered in finalizing the agreement?
 - What criteria and steps were defined for implementing the agreement?
 - What commitment procedures were used?
 - How useful has this series of activities been, particularly for practising facilitation skills?
 - What are the lessons learned for collaboration and negotiation among multiple stakeholders with varied interests?
- 9 Wrap up the session by emphasizing the following key learning points.

 **KEY LEARNING POINTS**

- Mediation cannot be conducted on an ad hoc basis: it requires careful analysis and strategy design.
- Failure to define when a dispute has ended or when a negotiated settlement has been reached can result in unnecessary extended conflict.
- The forms that symbolic conflict termination activities take depend on the (cultural) context in which the conflict occurs.

Attachment 5.9.A Instructions for the facilitator/mediator – final stages

You will facilitate the final phase of a mediation meeting.

Explain that the role of the mediator in this is to:

- help parties reach psychological closure;
- help parties to develop viable and effective implementation and monitoring procedures;
- encourage compliance with and ensure enforcement of agreements.

At this final stage, the mediator's tasks are:

1. Assessment of options.
2. Select the option that best meets parties' individual and joint interests; if necessary, refining that option to make it more acceptable.
3. Develop an implementation and monitoring plan for the agreement.
4. Decide how the agreement will be presented and acknowledged in its final form.
5. Reach psychological closure.

Present the results – the settlement options – from the previous mediation meeting. Explain that people negotiate because of the underlying interests they want to have addressed and satisfied. An option must therefore satisfy the parties' interests if it is to be considered an acceptable solution to the conflict.

The next step is for the parties to assess how well their interests will be satisfied by any one option or combination of options.

1 Assessment of options. Have the participants review the interests of each party and note any shared interests (you may want to use the conflict analysis and strategy design table, Attachment 3.2.A).

Have each party assess her/his/its own BATNA. The best alternative to a negotiated agreement (BATNA) helps each party to consider whether it would be in its own interest to accept or reject a solution. The purpose of negotiating is to produce a better result than would have been obtained without negotiation. This result is to be compared with the best outcome that can be achieved without negotiation.

If parties in conflict do not know what their BATNAs are, they might be either too optimistic and reject agreements that would have been in their interest to accept, or too pessimistic and accept agreements that are unfavourable and worse than what they could have achieved without agreement.

Developing a BATNA involves the following steps:

- Assessing one's own best alternatives:
 - listing all the possible alternatives that could be pursued if no agreement is reached;
 - considering the practical implications of the more promising alternatives.
- Considering the other parties' best alternatives:
 - what do I think their key interests might be?
 - what might they do if an agreement cannot be reached through negotiations?

2 Select the option that best meets parties' individual and joint interests. If necessary, refine that option to make it more acceptable.

3 Develop an implementation, monitoring and review (IMR) plan for agreements. Post the IMR chart (below) and review the instructions with the group.

Stage	What	Who	When	How	Adjustments
Implementation					
Monitoring					
Review					

What: What actions should be carried out?

Who: Who has been delegated to take responsibility for these actions?

When: The time schedule for when actions will be carried out.

How: Communications and other support for the actions.

Adjustments: Any changes that the group wishes to make.

Help the group to work through the IMR chart. Go back to group decisions occasionally and check the group's criteria for good decision-making, ensuring that actions for implementation do not undermine these (for example, by assigning all the work to one or a few of the parties).

Note: The criteria for evaluating implementation steps are similar to those used for evaluating the effectiveness of a substantive settlement option. Implementation steps should be:

- cost-efficient;
- simple enough to be easily understood, yet detailed enough to prevent loopholes that cause new procedural disputes;
- realistic in their demands or expectations of parties;
- able to withstand public scrutiny of standards of fairness.

4 Decide how the agreement will be presented and acknowledged in its final form. Introduce the following acknowledgement examples. The participants should decide whether they want a formal or an informal acknowledgement of their agreement.

- Formal acknowledgements:
 - registration in court;
 - publication in newspaper;
 - tree planting ceremony;
 - public meeting.
- Informal acknowledgements:
 - signed copies kept for the record;
 - jointly hosted banquet.

Assist the group in drafting the agreement. When the group has completed this task, introduce the following final agreement guidelines. The participants should draft their final agreement jointly, following the key points and adding any additional points that their agreement includes.

The final agreement should include the following elements:

- introduction to the interest parties;
- the issues in dispute;
- overview of the final resolution agreement;
- details about how each issue was addressed;
- details about future roles and responsibilities;
- IMR schedules;
- how to address future dispute issues.

5 Reach psychological closure. Explain that that this last step is to help bring closure to the agreement. It summarizes the conflict management process and mandates the future goals and responsibilities of all the interest parties. Ask if there are any activities that could be organized together to commemorate or celebrate the decision(s).

Note: A negotiated settlement endures not only because implementation plans are effectively structured, but also because parties are psychologically and structurally committed to the agreement. In this last phase, mediators therefore need to focus particularly on involving structural

and psychological factors that will bind the parties to complying with the terms of the negotiated settlement. Commitment-inducing procedures can be voluntarily, such as exchange of promises in the presence of authority figures, symbolic exchange of gifts, or informal or formal written agreements. Other commitment procedures are externally induced, such as legal contracts.

Finally mention that by working together to resolve their dispute, the participants have learned new ways of resolving their differences, communicating their interests and finding options that are satisfactory to all parties. Congratulate each party for his/her participation in resolving the dispute and thank them all for giving you the opportunity to help them achieve their objectives.

Note: Negotiated settlements are more prone to violation than are conflict resolution procedures with strictly defined implementation procedures. In part, this is owing to misunderstandings that result from poorly defined compliance criteria and steps. Mediators should therefore encourage disputants to design the criteria and steps for implementing their decisions carefully.

What is required for a negotiated agreement to become enforceable under law depends on the laws and rules of the legal jurisdiction in which the agreement is promulgated, and the forms that a contract can take. Verbal agreements are sometimes included, especially when made in the presence of a witness. In addition to the contents of the agreement, the way the settlement is written can make a difference in its acceptability and later compliance. There are four factors to consider when drafting agreements (Moore, 2003):

- clarity of the clauses: to preclude the possibility of diverse interpretations and misinterpretations;
- degree of detail in the clauses: the more precise the terms of settlement, the less likely that interpretation conflicts will arise;
- the balance of concessions: refers to the equity (not necessarily to equality of number) of the exchanges made by the parties;
- the positive attitude and perspective reflected: a final settlement has to reflect that it is an affirmation of the willingness and ability of the parties to cooperate.

Attachment 5.9.B Settlement agreement checklist

- Date of agreement
- Names and addresses of the parties
- Primary parties
- Secondary parties

Recitals (these are statements that are verified as accurate representations of the parties' relationship[s], assets and liabilities):

- Background about the parties' relationship(s)
- Reasons for the agreement
- Issues to be settled by the agreement
- Previous agreements that influence the current settlement
- Data about assets and liabilities (if applicable)

General introductory clauses:

- Statement that the recitals are correct
- Statement of governing laws, rules, standards, etc.
- Statement that each party has had an opportunity to consult a lawyer about his/her rights (if applicable)
- Definition of terms used in the agreement
- Statement that the agreement constitutes the full and final settlement of all issues
- Release by the parties of all claims arising out of their previous relationship, except those described in the agreement

Personal relations:

- Statement about future relationship
- Non-harassment statement (if applicable)
- Statement that the agreement does not bar future action on the part of the parties should any one of them violate the agreement

Clauses outlining specific promises or exchanges:

- Detailed description of performances and exchanges – amount, time, place, form
- Provision of a method for resolving future disputes
- Mediation or arbitration clause

Description of implementation and/or monitoring procedures (if applicable):

- Who, when, standards or criteria, steps in case of violation
- Summary or concluding paragraph
- Statement of the parties' intent to follow through on terms of settlement
- Signatures of parties
- Full legal names
- Signatures of witnesses (if applicable)
- Dates of signing, under signatures
- Appendices/attachments/documentation

Source: CDR Associates, 2006.

