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## Alternative dispute resolution in environmental conflicts - promises, problems, practical experience

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# **Alternative Dispute Resolution in Environmental Conflicts—Promises, Problems, Practical Experience**

Helmut Weidner

## **1 Introduction**

This book is about practical experience with alternative dispute resolution in environmental conflicts. "Alternative Dispute Resolution" (ADR) is a label applied to a larger variety of processes with varying degrees of institutionalisation which are meant to settle environmental and natural resource conflicts more effectively than conventional (formal) governmental decision making processes and legal procedures. ADR processes are recommended as an alternative to adversarial approaches, especially to expensive and time-consuming litigation, which until recently has been viewed as the only form of dispute resolution when legal procedures fail to settle a case or the parties involved fail to solve the problem on their own.

Although ADR is by no means a novelty, it is currently enjoying unprecedented popularity in the environmental arena in many countries. Non-adjudicative forms of ADR, commonly known as non-binding ADR (i.e. where solutions are not imposed upon the parties involved by a person in authority), such as mediation, facilitated policy dialogue, mini-trials, began their career as systematically used instruments for settling environmental disputes in the United States in the early 1970s, and have grown remarkably there over the subsequent 25 years. This ADR "movement" (but cf. Adler 1987, 1988) had a strong influence on the development of ADR instruments in several other countries. However, with the exception of Canada and the (culturally speaking) special case of Japan, a broad discussion and application of ADR began only in the late 1980s. Interest in its theory and its practice in these countries has been primarily directed at the instrument called mediation. In these countries mediation has received the most attention from scholars and practitioners active in the field of environmental conflict management, because this instrument has flourished particularly strongly in the United States and evidently seemed to be an appropriate technique for settling complex public policy conflicts. Mediation is a consensus process with a neutral, independent person acceptable to all of the participants, whose task it is to manage the process and to assist disputing parties in finding common agreement.

Most other countries have to a great extent oriented themselves around the techniques and organisational principle in the USA when structuring and conducting their own mediation procedures. For this reason also, mediation is a main focus of this book.

Despite the great interest in mediation procedures within every significant actor group in the environmental policy arena, the number of implemented procedures is still very low. Compared within Europe, Germany is a pioneer in environmental mediation, where almost as many mediations and similar procedures have been carried out as in the rest of Europe together. It is thought that the use of ADR will increase in most countries, but relatively slowly.

With regard to the differences in the development of ADR internationally, a wide variety of reasons have been put forward: differences in political and administrative culture, the severity of environmental problems, the problem solving capacity of conventional procedures and the existing legal system, for example. There has, however, been no systematic study of the reasons for the spread and use of ADR, or of its significance in resolving environmental conflicts. For this reason, there is still a great deal of speculation in many countries as to the benefits and disadvantages of mediation.

This book intends to prepare some of the groundwork for a future cross-national empirical and analytical study of ADR which can come to theoretically and empirically sound conclusions about the preconditions for, advantages and disadvantages of these procedures. Thus a sample of sometimes very different countries has been put together. In terms of political culture (cf. Lijphart & Crepaz 1991) they cover a spectrum from competitive to neocorporatist, litigious to consensus-oriented, centralised to federal, from environmental pioneers to "foot-draggers", to name but a few of the more important distinguishing characteristics.

Writers on the following 12 countries have been selected to give an overview of the development of ADR in the environmental sphere for this reader: USA, Canada, Germany, Switzerland, Austria, the Netherlands, Great Britain, Sweden, Denmark, Italy, Australia and Japan. For five of these countries (USA, Canada, Germany, Switzerland, Austria), there are also case studies, giving a deeper insight into the organisation of such procedures and the problems arising during their conduct. Most of the case studies deal with problems in waste management policy, which is one of the most conflictual environmental policy areas in all countries; in some cases—concerning nuclear or toxic waste—some of the participants, and also policy analysts, actually see a fundamental, non-negotiable, conflict. It may therefore be assumed that ADR procedures in other, less conflict-ridden areas will involve less trouble and have greater prospects of success.

Before coming to the generalisations which may currently be safely made from the studies collected here, there follows a brief introduction to the political context of ADR and its various forms, paying particular attention to mediation procedures.

## 2 The Political and Environmental Context of ADR

In past years, some areas of environmental protection have proved particularly resistant, or even allergic, to any attempts by environmental policy makers to exert control. These include large industrial and public projects in virtually all democratic industrialised countries where people are afraid of the negative consequences for health and the environment. Because, as a rule, they are facilities and infrastructure projects which are crucial to the functioning of an industrialised society (such as landfills, waste incineration plants, airports, motorways, dams, power stations), disturbances which may be environmental in origin also cause serious political and societal conflict, where powerful economic interests and state institutions are actively involved. The projects are opposed not only by members of the public who could be negatively affected by them and environmental organisations but also more and more by local public administrators and politicians, which makes "hard" enforcement of state decisions using conventional instruments (cf. Dente 1995) considerably more difficult than if it were a case of dealing "merely" with societal representatives and their organisations. Opposition from parties which understand all the intricacies of the political and legal system must therefore also be taken into account.

If, as is increasingly the case, the project in question is not dropped in the face of these conflicts, its realisation often becomes a very time-consuming and expensive business, the original objectives are watered down, the conflicts are shifted onto the implementation phase, which in turn causes "enforcement deficits" and the groups involved become embittered, not to mention the destructive effect on social relations within the town or region affected. In brief: traditional instruments at the disposal of governments for implementing their public policy objectives and responsibilities are proving to be increasingly unsuitable for achieving solutions to major environmental disputes which are not only economically viable, but also compatible with environmental needs and the wishes of society.

It is clear that the sharp increase in the economic, social and political costs of using traditional political instruments to deal with environmental conflicts is not simply a temporary phenomenon, part of an issue-attention-cycle, not just the latest wave of protest ("environmental hysteria", "pollutant of the week") which manifests itself in a few satiated opulent societies, but rather a new secular trend in the advanced industrialised countries. None of the groups involved in the conflicts is normally happy with the situation. This is evident from the reciprocal accusations made. The accusations levelled at industry are: failure of the market, ignoring the environment as an economic principle; the environmental groups are accused of hysteria and inability to enter into dialogue with others; politicians and public administrators are criticised from all quarters as lacking impartiality and

being incapable of taking decisions; critical scientists are even talking in terms of the failure of the state to protect the environment (cf. Jänicke 1990).

Everyone complains of the lack of instruments appropriate to the challenge of implementing effective environmental policies. This, along with the pressing nature of the problem itself, creates an openness towards unconventional instruments and encourages (by virtue of necessity) a willingness to take new approaches to dealing with environmental disputes. In any case, a constant growth in alternative forms of conflict management can be identified in certain countries, particularly within governmental and industrial structures. Some countries even have many years of practical experience behind them: what is still known as "alternative" dispute resolution is now well established in the USA and Canada. In Europe, as I shall go on to point out, it still leads only a shadowy existence. This contrasts with the vigorous debate on such instruments which is emerging in scientific circles and in private as well as public institutions acting in the environmental arena. However, in many of the countries included here, there has been a slow but ongoing introduction of these procedures since the start of the 1990s, and there are clear indications that this will continue to be the case.

### **3 Alternative Dispute Resolution Procedures**

The new "alternative" approaches to ending (or avoiding) episodes of environmental conflict have been developed and implemented in the United States since the early 1970s. They have been given many different labels: "alternative conflict resolution", "alternative conflict management", "consensus building", "assisted negotiation", "joint problem solving", "alternative dispute settlement", to give only a few examples. The word "environmental" is often used in place of "alternative", giving "environmental dispute resolution", etc. The general term in most common use for these procedures is "alternative dispute resolution", commonly abbreviated to ADR.

The term "alternative" is frequently used as a basic descriptor of these new approaches to dispute resolution. As this could give rise to misunderstandings, it is necessary to point out expressly that this does not refer to the replacement of traditional procedures for conflict resolution or decision making (such as parliamentary procedures or those undertaken by law courts or the public administration), but to their being complemented by these new techniques. The use of "alternative" is intended generally to emphasise that using these approaches involves the choice to do something different rather than relying exclusively on established (conventional) procedures of dispute resolution (cf. Susskind & Cruikshank 1987, Crowfoot & Wondolleck 1991). The alternative procedures can be used prior to, in parallel with, or subsequent to conventional procedures and other instruments or

can be linked to them. But ADR is not intended to—and, as the great majority of its proponents also say, never will—replace the legal system. ADR recognises however that other values are also useful and postulates that society will benefit from the availability of less adversarial and more co-operative procedures.

All the various types of alternative procedures have one thing in common: they are intended to settle disputes—and not necessarily resolve the underlying conflicts—through negotiation. Participation in the procedures is voluntary. The hierarchical structure of conventional procedures has been almost entirely abandoned: representatives of public administration, for example, do not have any special authority to exert control or take decisions. The objective is to find a solution based on consensus or compromise. These procedures are usually informal, i.e. the people taking part draw up the rules themselves. A certain tendency to make them subject to regulations can, however, be observed, in two senses: legislation of different kinds is being drawn up for alternative procedures and general standards are being put forward by professional institutions and associations (cf. Sander 1990 and Gardner 1990).

A classification system prepared by Susskind & Madigan (1984: 180 ff.) lists the following different types of procedure for settling disputes; the criterion for the classification is the "degree of activity" with which independent people "intervene" in the procedure:

*Table 1. Classification of Alternative Procedures for Settling Disputes*

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- 1 Unassisted negotiation
  - 2 Facilitated policy dialogue
  - 3 Collaborative problem solving
  - 4 Passive (or traditional) mediation
  - 5 Active mediation or mediated negotiation
  - 6 Non-binding arbitration
  - 7 Binding arbitration
  - 8 Adjudication
- 

*Source: Susskind & Madigan 1984*

In the meantime there have been numerous proposals for systematically classifying approaches to ADR (cf. Susskind & Cruikshank 1987, Goldberg, Sander & Rogers 1992, Feindt 1997). For procedures being carried out in practice, a basic distinction is often made between private, public, conventional and alternative procedures. "Private" procedures are those in which conflicts without any public interest or without the involvement of public institutions are settled (for example

arbitration negotiations to settle labour disputes). Correspondingly, "public procedures" deal with public policy disputes in which public institutions are directly or indirectly involved as a result of legally established requirements. Conventional procedures for settling disputes include traditional, administrative, legislative and judicial procedures. They are governed by formal regulations which come into force when particular conditions exist; the regulations and procedural stipulations leave the parties in the dispute little scope to determine independently the course of the procedure and its content.

Further distinctions are made according to the subject of conflict. For example, the term policy dialogue is used to refer to the process of agreeing upon relevant social, environmental and economic basic rules (codes of behaviour for specific industries, proposals for legislation or political programmes). In the case of negotiation about legally binding regulations and standards in the public sector, the term "regulatory negotiation" is used and usually shortened to "reg neg" (cf. Harter 1982). Information exchange and joint problem solving is concerned with creating a common base of knowledge (on which there is consensus). Consensual conflict management procedures mostly deal with concrete planning schemes and construction projects (site-specific disputes).

This is not the place to go into detail on the great range of terms used in the field of alternative dispute resolution, and which are becoming increasingly difficult to keep track of. This book is concerned solely with procedures of assisted negotiation for resolving public disputes involving environmental issues (in a broad sense of the term), preferably with mediation procedures, which have been shown to be a particularly complex, but also particularly successful procedural form (cf. Bacow & Wheeler 1984, Bingham 1986). Mediation is thus broadly understood as the presence of a neutral person (or team) in a negotiation. These neutral intervenors are sometimes called mediators, sometimes moderators or facilitators. Because—as Bingham (1986: 5) has shown—the distinctions are very blurred in practice, the term mediator is used predominantly in this book.

As is in general the case with ADR, there are also plenty of definitions of mediation. Gerald W. Cormick (1980: 27), who pioneered the use of the mediation process in environment conflicts, defines mediation as:

A voluntary process in which those involved in a dispute jointly explore and reconcile their differences. The mediator has no authority to impose a settlement. His or her strength lies in the ability to assist the parties in resolving their own differences. The mediated dispute is settled when the parties themselves reach what they consider to be a workable solution.

Another definition of mediation (MacDonnell 1988: 12 ff.) which includes definitions by other authors, states that:

Mediation introduces an outside neutral into the settlement process to act as a facilitator. Stulberg has provided the following explanation of mediation: 'The



mediation process can be characterized as follows: It is (1) a non-compulsory procedure in which (2) an impartial, neutral party is invited or accepted by (3) parties to a dispute to help them (4) identify issues of mutual concern and (5) design solutions to these issues (6) which are acceptable to the parties.' As with negotiation the only rules or structures that apply are those imposed by the parties themselves. No objectively definitive norms or principles are assumed to control the outcome. As Fuller suggests, it is the settlement itself that creates the norm. And, like negotiation, the settlement requires the mutual agreement of the parties.

Gerald W. Cormick (1980: 27), in his definition quoted from above, lists a series of criteria which are essential for a true mediation procedure:

(1) The parties cannot be required to negotiate or cannot be unduly coerced to agree to any particular settlement of their differences. Indeed, unless they are willing to enter into the process with some intent to reach an accommodation of their differences, the mediation effort is not likely to be viable. (2) There will be a joint or face-to-face exploration of the issues, that is mediation must be seen as an adjunct to the negotiation process. (3) The mediator supports and facilitates the negotiation-mediation process by improving communications, serving as an interpreter, arranging meetings, suggesting alternatives, helping to draft language, assisting in maintaining communication with those not 'at the table', and so forth. Whereas in labour-management disputes the mediator typically enters a dispute to revive lagging or severed negotiations, in environmental disputes the mediator usually serves a primary function in establishing a negotiating relationship. (4) Any agreement reached is the creature of the parties and must be deemed viable and acceptable by them. The mediator is not party to the agreement.

Seen in terms of negotiating, a central device in political theory and even more so in policy analysis, mediation can be defined as negotiation with the assistance of a trusted, independent and impartial third party whereby negotiation itself is defined (Iklé 1972: 117) as:

... a form of interaction through which individuals, organisations and governments explicitly try to arrange (or pretend to do so) a new combination of some of their common and conflicting interests.

From environmental policy studies we know that different scale negotiations take place in environmental policy processes on all levels, formal and informal, at programme development stage and implementation stage and that they are used in conjunction with virtually all environmental policy instruments (even the so-called "command and control" instruments). Unlike these established forms of negotiation which may be legally legitimated or, as often is the case, take place in the shadow of the law, mediation not only includes a third party as guardian of the procedure but negotiation here has to fulfil some basic prerequisites specific to the form of mediated negotiations. These include the following minimum conditions (cf. Cormick 1980: 28):

1. There must be a recognition by all parties of the necessity of other parties participating in the process as coequals; that means some level of partnership between the parties has to be achieved.
2. Each of the parties involved must have sufficient power or influence for sanctioning other parties' abilities to take unilateral action.
3. Participants should be able to commit themselves and their constituencies to implementing agreements reached in the negotiation process.
4. Participants must have some sense of urgency with respect to settling the dispute.

It is one of the central responsibilities of the mediator to ensure that these basic conditions are fulfilled both before and during the procedure.

It is becoming clear that the mediator would have to possess almost super-human qualities and skills in order to be able to fulfil the role assigned to him or her in the mediation procedure. Although the ideal person will seldom be found, practice has nevertheless shown that there are sufficient people with a natural leaning to the job who at least adequately fulfil the requirements. In the USA, institutions running systematic training schemes grew up in the 1970s. Later, this was also the case in Canada; in Europe, this form of specialised training is still very rare. In the UK, the Netherlands and, recently, in Germany also, such training programmes do take place from time to time, sometimes in co-operation with mediation experts from the USA.

Since there is a wide variety of accessible literature, both theoretical and practical, on the design of mediation procedures and the characteristics and abilities of the mediator (cf. Bacow & Wheeler 1984, Folberg & Taylor 1984, Susskind & Cruikshank 1987, Moore 1987, Goldberg, Sander & Rogers 1992, Gaßner, Holz-nagel & Lahl 1992, Fietkau 1994, Fietkau & Weidner 1998), it is not necessary to go into detail on the methodological and practical aspects of designing and implementing mediation procedures, nor into the skills required of the mediator. In general it can be said that there are as many philosophies and approaches to mediation as there are mediators (cf. Cooper & Meyerson 1991: 34). And a comparative study of literature has shown that mediators apply some hundred different techniques to the relationships between the parties, to the parties themselves, and to the parties' relationships with others (Wall & Lynn 1993: 165).

The following criteria are usually given as the important characteristics of a mediator: neutrality on the issues of the conflict and the participating actors, independence from any interest groups relevant to the conflict (including those not taking part in the procedure), communicative competence, at least a basic understanding of environmental and environmental policy problems. They should be financially independent, inasmuch as they are able objectively to judge their own suitability for particular cases. Mediators must be willing to turn down work and

carefully assess each potential case prior to committing themselves to take over the task or to a particular design. Further requirements on the mediator (on the nature of the role of the mediator cf. Stulberg 1981) vary with the kind of case. Thus, for example, it can be an advantage to have knowledge of political and administrative procedures or a high social standing, authority or a persuasive nature. Sometimes it has also proved useful to have a mediator with great experience in the technical field of the dispute. However, the literature contains a clear majority of opinion that the most critical mediation skills relate to the process, not the substance:

If you must choose, choose mediation expertise over subject matter expertise. An experienced mediator can be relied upon to assimilate rapidly the key technical and legal issues in even the most complex lawsuits (Cooper & Meyerson 1991: 36).

Another—more frequently used—possibility of managing the dilemma of selection is to set up a mediation team in order to cover every requirement in the particular case.

In the USA (and to some extent in Canada), legislators, courts and various professional organisations have established standards to ensure a certain level of qualification among mediators. An increasingly common means for ensuring the quality of neutral persons is to establish "rosters", through which parties can obtain the services of a neutral person, while they themselves provide services independently of the organisation maintaining the roster. Despite a heated and already long debate on the qualification criteria for mediators, monitoring them and the form that this can take (e.g. regulation by statute, mandatory standards of certification, voluntary standards such as a code of ethics), there is still no agreement among experts as to the best path to take (cf. Rogers & McEwen 1989/1991, Goldberg, Sander & Rogers 1992: 159 ff.).

Similarly, the situation with regard to the design of mediation processes is characterised by a variety of sometimes conflicting proposals as to the ideal organisation of a procedure. Equally—again in the USA and Canada, but also in certain kinds of case in Australia—there are already mandatory regulations for specific conflict areas, or where public authorities or the courts are central (initiating) actors. This legal institutionalisation of mediation procedures has been met with criticism by countless mediation experts, particularly because of the limitations it places on flexibility (cf. IEN/RESOLVE 1994). Moreover, there is a fundamental principle that all parties must have an equal opportunity to participate in designing the process, because ultimate control over the mandate, agenda, issues, etc. should come from the participants themselves; each process should be designed to meet the circumstances and needs of the specific situation and conflict. Thus, it is difficult to generalise about the design of mediation processes. Despite a recognition of this diversity, there is more or less agreement in mediation literature

that a mediation procedure should, in principle, consist of three different phases, each with their own specific tasks and requirements. The following is just such a basic model (from Susskind & Cruikshank 1987: 95):

*Table 2. Basic Phases of a Consensus Building Process*

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### Prenegotiation Phase

Getting Started  
Representation  
Drafting Protocols and Setting the Agenda  
Joint Fact Finding

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### Negotiation Phase

Inventing Options for Mutual Gain  
Packaging Agreements  
Producing a Written Agreement  
Binding the Parties to Their Commitments  
Ratification

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### Implementation or Postnegotiation Phase

Linking Informal Agreements to Formal Decision Making  
Monitoring  
Creating a Context for Renegotiation

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*Source: Susskind & Cruikshank 1987*

## 4 The Pros and Cons of ADR

Advocates of ADR focus as a rule on its advantages over conventional instruments for settling or avoiding environmental policy conflicts. They maintain that ADR procedures can lead to fairer, more effective, efficient, rapid results which are acceptable to all parties to the conflict. They also point at the benefits offered by ADR, which result from avoiding the disadvantages of litigation, even where the courts operate at maximum efficiency—prohibitive costs, delays and no final adjudication on the merits of the claim. According to this, ADR offers so many advantages that it is also a superior alternative to the best litigation system (cf.

Cooper & Meyerson 1991: 6 ff.), because, for example, it increases the availability of subject-matter expertise, strengthens rather than destroys the relationship between the parties in a conflict, gives the parties to the dispute greater control over the resolution process (means, time, etc.), offers the possibility of maintaining confidentiality on certain aspects important to them, offers a resolution process that is responsive to the needs of a changing society and can keep pace with technological progress.

A particular advantage of alternative methods of conflict resolution, they go on to say, is that, unlike conventional instruments which often produce win/lose solutions, they produce solutions where everybody wins (win-win solutions; cf. Fisher, Ury & Patton 1991). A particularly important point is held to be the potential of these procedures to initiate social and political learning processes, which is to be welcomed especially from the point of view of democratic theory and social reform:

Our view of why social reforms often fail is that they are imposed from above . . . . One of the most exciting aspects of consensual approaches to dispute resolution is that once people use them, and find that they work, those people become advocates. The act of participation, and especially the fruits of success, changes their sense of how best to proceed . . . . Unlike most reforms, consensus-building has the great advantage of built-in learning. The reformed become the reformers. We contend that it is precisely this kind of learning that allows a reform to take root and endure (Susskind & Cruikshank 1987: 246).

Furthermore, it is emphasised that the legitimacy of decisions (and the bodies responsible for taking them) is increased as substantive participation and orientation towards consensus are increased, information barriers are broken down, innovation receives a stimulus, thereby making possible approaches from beyond the usual technocratic (peripheral, symptom-based, end-of-pipe) approaches (cf. Jänicke 1995: 182).

Critics of ADR procedures point out a number of weaknesses, often using examples of individual case studies: the criticisms are broadly persuasive, but often apply only to the specific circumstances of the particular case, and from which deficits inherent to the instrument itself cannot necessarily be inferred. Nevertheless, some general inherent deficits have been pointed out which evidently cast some doubt upon the aforementioned advantages. Douglas J. Amy summarised these fundamental criticisms, often made in other countries too, as follows:

At first glance it is difficult to see why anyone would criticise the environmental dispute resolution approach. Why would anyone be against such desirable things as cooperation, communication and win-win solutions. Nevertheless, there are critics of this process and they have three general areas of complaint: first, that many of the EDR (environmental dispute resolution) advocates' criticisms of litigation are exaggerated and inaccurate; second, that EDR may work more to the

advantage of business groups than environmentalists; and third, that EDR fosters a distorted understanding of the nature of environmental conflicts (Amy 1990: 221).

To substantiate their claims, critics point out that when mediation procedures are used for industrial projects which are rife with conflict, they are highly time-consuming and expensive. Even advocates of ADR, such as Gail Bingham, were unable to show that these procedures are more rapid and less expensive:

Perhaps the single most common assertion made about environmental dispute resolution processes . . . is that they are cheaper and faster than litigation. There has been little empirical evidence to support this assertion, however (1986: xxv).

With regard to fairness, critics argue that, contrary to what is promised, no truly widespread participation is made possible, but that well organised environmental interests dominate, while less powerful groups are consciously or unconsciously left out. In the procedure itself, it has not been possible to eliminate the asymmetrical distribution of power in society to such an extent that representatives of environmental interests can negotiate with the same skill and corresponding success as highly-trained representatives of business or the government. Finally, a fundamental, insoluble dilemma has been pointed out. Some major environmental disputes were, are and will be based on differing (and deep-rooted) values and principles which are fundamentally incompatible. This constellation cannot actually accommodate compromise, at least not between the interests of industry and the environment. The following conclusion would have to be drawn from this:

If many environmental issues are of the non-negotiable type, then it would follow that a more aggressive and adversarial form of environmental politics should be practised. This vision of environmental politics would embrace litigation, and would celebrate, rather than criticise, the win-lose style of decisions handed down by the courts because this allows for the complete vindication of the environmental position (Amy 1990: 227).

Further criticisms are that (e.g. by excluding the press) the negotiation process is to a great extent non-transparent for the general public, thereby putting at risk the rights of the majority (the public good) as well as of insufficiently well-organised minorities, that the implementation of agreements reached is made more difficult, as organisations become less able to oblige their members to keep to agreements in which their representatives took part, that it could lead to a weakening of democratically legitimate public institutions—an argument put forward predominantly in Europe—that the political parties (which should in fact function as mediators in the political process) would suffer a further, crucial, loss of responsibility through ADR.

Laying the hotly debated "big" (social, political, democratic) issues in ADR to one side for the time being, the principal arguments generally applied for and against ADR can be summarised as follows:

*Table 3. Opportunities and Limitations of ADR*


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Opportunities
Faster resolution of disputes Lower costs to all parties to the dispute A resolution on the merits Inclusion of special expertise of all sorts Increased rationality of decisions Preservation or creation of long-term relationships and actor networks Greater participant control of the process and the outcome More flexibility (from precedents, etc.) Securing of (legitimate) confidentiality Inclusion of normally under-represented interests Keeping pace with a changing society and technology Participants determine codes of conduct Implementation facilitated Opportunity to reach a win-win resolution, or at least an acceptable compromise.
Limitations
Unfamiliarity with ADR Unequal bargaining power Strategic negotiation (e.g. to postpone decisions) Gaining agreement from the parties' constituencies Need to involve all stakeholders Need for a legal precedent Vulnerability to exogenous influences (changing context, intervention by non-participating actor groups, etc.) No general discouragement of litigation High degree of unpredictability Values (non-negotiable interests) at stake Finding someone to pay for the process

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Although the broad democratic questions (or caveats) raised with respect to ADR have not yet been satisfactorily answered, one can, based on the literature and the level of the debate and practice of ADR in the countries dealt with here, say that

the potential advantages of ADR (especially over the status quo) are evidently thought to dominate (cf. Cormick et al. 1996: 109 ff.). The same is also true for the risks and opportunities associated with the structure and conduct of ADR procedures, and about which there is already empirical information. It is very important not to allow unrealistically high expectations to be raised. Not all disputes are appropriate or ready for ADR. The parties need to make a realistic assessment of their chances and risks with the help of an experienced neutral person to find out what their "best alternative to a negotiated agreement" (BATNA) could be. If the parties conclude that, for example, litigation offers a better option for pursuing their interests, then they should choose this option. In addition, the remaining risk for participants associated with ADR is also considered acceptable, because every participating party is free to leave the process and then pursue their interests exclusively through established procedures (including litigation).

Nor should it be forgotten that the choices between consensual and conventional processes are not always mutually exclusive. For some groups it could be reasonable to start with litigation, protest campaigns, etc. to strengthen their power position, in order that they be taken seriously by the other participants in a subsequent ADR process. "What this means is that the consensus process should be seen not as a wholly separate approach but, in many cases, as complementary to and even dependent on more confrontational options" (Cormick et al. 1996: 21). This dialectical relationship between conflict and consensus is also meant when it is said that "bargaining in the shadow of law" (Mnookin & Kornhauer 1979: 950) has generally greater prospects of success than negotiation procedures where no last resort to hierarchical decision making or to other confrontational or adversarial approaches exists.

Finally, it can often be seen that the use of ADR in a large number of the countries studied (including Italy, Austria, UK) is not rare primarily because there are persuasive, generalisable arguments against them, but rather because of structural resistance within the legal or political system, or also because those who profit from a conventional, weak environmental policy can still pursue their interests more effectively through conventional regulatory systems—even where they themselves complain about costly and time-consuming processes.

## **5 Developments in Individual Countries**

### **5.1 USA**

The career of mediation as an alternative instrument for settling environmental disputes, an instrument which is now widely discussed in Europe as well, began



in the USA. Here this path was first followed in the field of the environment in the early 1970s—although it had already been used in the 1960s to settle community and labour-management disputes. The initiative in the environmental sector was taken by Gerald W. Cormick and Jane E. McCarthy who, with financial backing from the Ford and Rockefeller foundations, successfully carried out a mediation project concerned with settling disputes over the planned construction of dams on the Snoqualmie River in Washington State (cf. Dembart & Kwartler 1980). This procedure, the first explicit effort to mediate an environmental dispute, began in 1973, when Cormick and McCarthy initiated discussion with several parties to a flood-control and land-use planning conflict concerning the river. At the end of 1974 the effort ended successfully, with a written agreement between about a dozen parties involved in the conflict.

This pioneer procedure was followed by others, conducted by other people, and by the beginning of the 1980s the experimental phase was already at an end: mediation had become institutionalised and professionalised. Mediation had evolved from a promising experiment to a widely accepted public policy option.

In many US states there have been numerous private, semi-private and state mediation institutes which have offered their mediation services for several years now, train mediators and produce scientific analysis. Presently there are 18 state-sponsored mediation offices. Many of the major non-governmental environmental organisations (such as the World Wide Fund for Nature, Conservation Foundation) favour this procedure, some of them very enthusiastically. It has also gained popularity and support among private enterprises and governmental institutions. In view of this and its relative success in practice, it is being called an "economic growth sector" and there is talk of a "mediation movement" or even a "mediation boom".

In the United States, mediation procedures are now used at all levels of government (local, regional, state and federal) and in a wide variety of political spheres: for example, in land use decisions, licensing of stationary sources, hazardous waste management (cf. Morell in this book), infrastructure programmes, rule-making procedures, fundamental political declarations, development of codes of behaviour for specific industries regarding particular environmental issues and in the development of general codes of behaviour for dealing with environmental conflicts.

Cormick & Knaster (1986: 7) consider the sharp increase in mediator-assisted negotiations within the development of general consensus regulations to be particularly worthy of emphasis:

The greatest current expansion in the use of mediated negotiations is in the development of consensus regulations, where parties in conflict are brought together to hammer out regulations that all parties find acceptable. This process has come to be known as regulatory negotiation or "reg neg". The concept of negotiating

regulations was originated and developed by Philip Harter and has been used by a number of federal and state agencies. The first three cases involved the negotiation of regulations on non-conformancy penalties for vehicle emissions at the Environmental Protection Agency (EPA), on crew flight and duty time at the Federal Aviation Administration and on the benzene exposure at the Occupational Safety and Health Administration.

The passage by the US Congress of the Administrative Dispute Resolution Act of 1990 (Pub.L. 101-552) and the Negotiated Rulemaking Act of 1990 (Pub.L. 101-648) as well as the issuing of an executive order by President Clinton (directing federal agencies to use *regneg* more frequently) have strengthened this trend (cf. IEN/RESOLVE 1994: 8, Fiorino 1997). These regulatory negotiations complement, but do not replace the conventional rulemaking process, as defined e.g. under the Administrative Procedure Act (APA), other statutes and numerous court rulings.

As early as in 1982 a resolution was passed by the Administrative Conference of the United States (ACUS), encouraging federal authorities to include negotiation—also in the form of mediation—in procedures for developing norms and standards. Since then, the ACUS has been supporting the authorities in this, through analysis, reports, manuals, training courses, publishing an annotated directory of mediators, etc. (cf. ACUS 1995). In an assessment of the actions of the authorities in this respect, the ACUS came to a positive judgement overall, but pointed out that "much remains to be done" (ACUS 1995: v; cf. also Rose-Ackerman 1995). Particular emphasis was laid on the fact that the Environmental Protection Agency (EPA) is one of the most active proponents of *regneg* among authorities.

By the end of 1995, the EPA had conducted about 16 negotiated rulemakings. In most of them the participants were able to reach a consensus that formed the basis for a proposed rule, which is published for public comment, as required under APA (Fiorino 1997: 68 f.; cf. also Kerwin & Langbein 1995). Only in a few cases did the negotiations fail, because the issues were too complex or the parties were too distrustful.

Associated with the increase in ADR was the professionalisation and commercialisation of the job of mediator. A symposium on environmental dispute resolution conducted in 1992 came to this, among other conclusions:

Ten years ago, nearly every organisation practicing environmental dispute resolution was operated on a not-for-profit basis, with foundation grants as the primary source of funding. Today, there is more diversity in organizational structure and sources of funding. Sole practitioners, non-profits, and for-profit organizations operate with comparable success, and nearly all rely more on fee-for-service revenues than on foundation grants . . . .

Most of the organisations . . . provide a wide variety of services. Nearly all mediate both site-specific and policy cases. For out of five conduct negotiation training courses, two-thirds facilitate strategic planning sessions and provide

consulting on negotiation strategy. More than half write case studies and design dispute resolution procedures (IEN/RESOLVE 1994: 8).

Several conferences, trade magazines and newsletters (e.g. RESOLVE, CONSENSUS) provide the "mediation community" with continuing and up-to-date information, and various organisations—e.g. SPIDR (Society of Professionals in Dispute Resolution), NIDR (National Institute for Dispute Resolution)—pursue their interests, as well as produce training guidelines, certification criteria and codes of ethics or codes of behaviour. SPIDR has published an extensive discussion of competencies for mediators (SPIDR 1992). With respect to the competencies of mediators there is, as a rule, the imposition of minimum qualifications by some public agencies or in the case of court-appointed mediators.

In what is probably even today still the most comprehensive study of evaluation of mediation procedures for settling environmental disputes (Bingham 1986) the figure under the line proved to be positive. The generally positive results which Bingham identified in her analysis of about 130 cases are backed up by more recent studies (cf. Crowfoot & Wondollock 1991, IEN/RESOLVE 1994, Elliott in this book). However, there are also critical voices which claim that the positive effects of ADR are overestimated, failures not sufficiently taken into account, the manipulative character of this kind of procedure is partly overlooked and that generally speaking the positive aspects are pushed to the foreground, because in the meantime a large institutional and financial interest in carrying out these procedures has developed. They also point out that the results are often analysed by the "neutrals" (mediators, etc.) themselves or by scientists from institutions kindly disposed to mediation (cf. Amy 1990, 1987, 1983; Abel 1982a, b).

Society is often not willing in practice to wait for the outcome of this theoretical and ideological dispute. The use of ADR in the United States is constantly on the increase. Even Amy, one of the most severe critics of ADR procedures also points out: "In any case, it is clear that environmental dispute resolution has now gained a foothold in environmental politics and that it is here to stay, in one form or another" (1990: 232).

Proponents of ADR as well as practitioners in this field are also not totally uncritical of the approach. Because of their many empirical experiences—something fundamental critics clearly do not possess—they are able to point out deficits, weaknesses, still insufficiently addressed problems and emerging difficulties (cf. for many of them Moore 1996, Cormick 1987, SPIDR 1987, 1990, Susskind & Cruikshank 1987, Carpenter & Kennedy 1988, Armour 1991, Sander 1990, O'Hare 1990, Gardner 1990, Bingham & Mealey 1991, Goldberg, Sander & Rogers 1992, IEN/RESOLVE 1994, Fiorino 1997). They mention, among other things, funding difficulties, the unequal bargaining power of the participants, the unpredictability of the process, the exclusion of the general public, limited transparency, vulnerability of reached agreements in the implementation phase,

biased role or incompetence of the mediator, influential external political pressure or significant influences by changing external circumstances, unsuitability for value conflicts.

Most of the problems mentioned are, however, thought by proponents to be soluble, or at least reducible and manageable, though improvements in mediation techniques, legal change, training and a general "social learning" process. All the same, quasi-structural problems for which there has as yet been no cure have been pointed out. These include, among others, the type and extent of mediators' legal responsibility, the indirectly political effects of mediators' interventions (especially those of the active mediator type), inherent dangers to reduce due process protections (established by conventional procedures), the distributional and long-term effects of pragmatic compromises (e.g. concerning an environmentally sustainable and just society), mutually exclusive and not negotiable values, the strong tendencies towards institutionalisation and legalisation of ADR procedures.

For some time now, work has been carried out on these problems on a broad basis (cf. for many Bacow & Wheeler 1984, Susskind & Cruikshank 1987, Bush & Folger 1995), and the affected professional associations also promote debate (cf. e.g. SPIDR 1990, IEN/RESOLVE 1994). The basic trend of the debate up to now has been to say that, in a pluralistic, highly dynamic, democratic society, it will not be possible to find an "ideal" solution to all the problems mentioned—and it is naturally the subject of vigorous debate what "ideal" actually means—but that ADR is at any rate the "least worst" solution compared with the status quo: there is no reasonable or realistic alternative to the extension and expansion of ADR. Particular attention is drawn to the manifold potential of ADR to contribute to a strengthening of democratic processes in polity and society in the long term, and to support the democratic parliamentary standards and institutions which have long been suffering a steady erosion of legitimacy (cf. the remarks by Larry Susskind in IEN/RESOLVE 1994: 32 f.). In general, it can also smooth the path towards developing a strong civil society (e.g. communitarism) by empowerment and recognition (cf. Bush & Folger 1995).

## 5.2 *Canada*

In Canada, ADR has been on the increase since the 1980s—stimulated and shaped by developments in the USA (cf. Dorsey & Riek 1989, Shrybman 1989, Sigurdson in this book). Here too, the central cause was the increase in environmental conflicts which became ever more difficult to resolve with traditional instruments. Courts became increasingly prominent in the environmental policy process, many political and administrative decisions came under judicial review. Associated with the development of ADR was a broad process of institutionalisation: there are

now numerous private and public institutions active in this area, around 20 organisations provide services in environmental mediation (cf. British Columbia Round Table on the Environment and the Economy 1991a, b; Shaftoe 1993, and the in-house reports in various issues of Canadian Environmental Mediation Newsletter). One of the private organisations, for example, is The CSE Group, based in Vancouver, to which the experienced mediators Gerald Cormick and S. Glenn Sigurdson belong. Alongside mediating sometimes highly complex conflicts (cf. the report on the Sandspit case by Sigurdson in this book), they also conduct training courses in ADR.

In a large number of public administrations at all levels (national, provincial, local), employees are trained in ADR techniques. A great variety of different techniques (moderation, mediation, facilitation, etc.) is used in every significant area of the environment, e.g. land use, licensing of plants, road construction, dam building (cf. Dorsey & Riek 1989: 12, Cormick et al. 1996: 114 ff.). The implementation of agreements has proved to be largely unproblematical, and in this respect ADR procedures are considered successful instruments with potential for growth in the future (cf. Cormick et al. 1996, Sigurdson in this book). Consensus processes are seen to be especially well-suited for conflicts in which native Canadians ("First Nations") are involved, as well as for disputes over sustainability:

Building consensus among a number of diverse entities with little or no experience in working together, where there is no preexisting structure for discussions, and where the issues are divisive and of deep concern is a daunting challenge. Therefore, it is not surprising that most successful consensus-building efforts in complex disputes over sustainability have been assisted by one or more mediators (Cormick et al. 1996: 12).

The acceptance of these procedures by actor groups from all social areas was strongly supported by the Dispute Resolution Core Group, which was established under the aegis of Round Tables on the Environment and the Economy. It made a careful study of the use of the procedures in Canada (and sometimes also in the USA), finally recommending an increase in their application (cf. British Columbia Round Table on the Environment and the Economy 1991a, Cormick et al. 1996). At the start of the 1990s, a process of legal institutionalisation began. The Federal Environmental Assessment Act enables government to use mediation as an alternative to full assessment panels if the concerned parties agree. In Nova Scotia ADR is established by law as a possibility for making various environmental decisions. In the Yukon Territory in May 1992, an Environment Act was passed, explicitly opening up the possibility of mediation. In the Province of Québec, mediation has been used informally, and with positive results, for many years by a special public institution (Bureau d' Audiences Publiques sur l'Environnement, BAPE) when convening public hearings on environmental matters (Environmental

Impact Assessment Review), and in 1993 the formal terms of reference for BAPE were expanded to recognise the agency's mediation role (cf. Renaud in this book).

### 5.3 *Japan*

ADR has been in use for managing environmental conflicts for many years in Japan, where the consensus-oriented political culture broadly supports "conciliatory conflict management procedures". However, if this tradition is systematically and seriously ignored—as was the case during the environmentally ignorant phase of Japanese environmental policy, when talk was of an "environmental harakiri"—militant conflicts can still result (cf. Tsuru & Weidner 1989). Under normal conditions there is scarcely a large project affecting the environment where efforts are not made to find a negotiated settlement. Inasmuch as mediators or moderators participate, they are generally people of high standing within the community, sometimes including the scientific community; there are on the other hand no professional mediators, offering a service for which they charge (cf. Weidner in this book).

As a consequence of the extraordinarily heated environmental conflicts in the 1960s, Japan's 1967 Basic Environmental Law (Article 21) already laid the foundations for specific legal regulation of extrajudicial conflict resolution procedures. This obliges the government to institutionalise mediation, arbitration and conciliation procedures. As early as 1970, a first stage, the "Law on Resolving Disputes Associated with Environmental Damage" came into force. The mediators operating here are officials or members of a formal committee, set up under the implementation of the law, and which does not always enjoy the full confidence of all parties to the conflict. Thus this legally provided path is primarily taken in order to avoid extremely expensive and drawn-out court procedures, and only infrequently in the expectation that it might lead to a genuine win-win solution for all parties.

In all, the various institutionalised dispute resolution procedures are seen to have positive effects compared to those of conventional procedures, and mediation processes are considered particularly effective. It is said these procedures increase flexibility and the possibilities for participation. They also compensate to some extent for the huge limits on access to the courts for those affected by environmental problems, as complainants' rights are very restricted and court cases are, as a rule, very costly and time-consuming (cf. Sagami 1989).

Particularly at local level, conciliatory dispute resolution procedures and consensus-oriented decision making are widespread. Probably the most significant are the so-called voluntary environmental protection agreements (*kogai boshi kiotei*), with which environmental conflicts are also resolved—albeit to a very limited extent. There are currently over 45,000 of these agreements between

companies and local communities or citizens' groups, where environmental protection measures are negotiated (cf. Weidner 1996a).

There is little or no professionalisation or institutionalisation of environmental mediation (for example through commercial providers of specific training programmes) in Japan. Correspondingly, there has also been no notable development of specific mediation techniques, as is particularly the case in the USA. It is also not expected that ADR procedures will play a significant role as in the USA.

#### 5.4 *Switzerland*

There have been some 12 large procedures in Switzerland which could be broadly termed mediations. Even in the conflictual area of waste policy there have been successful procedures, such as for the licensing of a hazardous waste incinerator or siting a hazardous waste landfill (cf. Enderlin Cavigelli 1996, Knoepfel 1994 and in this book). In addition there are three policy dialogues organised similarly to mediations which, compared internationally, are of outstanding complexity and economic significance. They have led not only to remarkable partial consensus, but also to a general strengthening of the positions of state authorities and environmental organisations against the electricity generating sector which reaches far beyond the procedures themselves (cf. Enderlin Cavigelli and Wälti in this book). It may be assumed that ADR procedures will also play what is quantitatively only an auxiliary role in Swiss environmental policy in future, as a consequence of the various formal and informal traditional procedures, which guarantee environmental organisations very good opportunities for participation, but that they will increasingly be used in particularly disputed and complex issues.

#### 5.5 *Austria*

The situation with regard to ADR procedures in Austria is roughly comparable to that in Switzerland. However, here the small number of procedures is primarily attributed to the restrictive behaviour of authorities and project managers, fearful of a loss of influence. Some of the larger environmental organisations have broadly abandoned their initial reservations about these procedures and are—given fair conditions to start from—generally prepared to participate. There are no institutions which have specialised in the conduct of ADR, but there are some individuals in private consultancies who are prepared to conduct such procedures. A slight increase in ADR is expected, in connection with the conduct of legally required environmental impact assessments, as this offers some suitable points of contact (cf. Nicolini & Ocenasek in this book).

## 5.6 *Australia*

In Australia, however, ADR procedures (especially mediation) have been used increasingly over the last few years. The most significant reasons are increases in environmental conflicts and court cases. These processes are clearly well-suited in land use conflicts and—similarly to the case in Canada—in interest arbitration with Aborigines. There is a gradual institutionalisation at all levels of government (e.g. Dispute Resolution Centres), and parties to conflicts in New South Wales can, in certain cases, choose between a court case or mediation, according to legally defined criteria (cf. Rollinson in this book).

## 5.7 *Denmark, Sweden and the Netherlands*

In Denmark, Sweden and the Netherlands there have been to date no "classical" ADR procedures, and only a few mediation-related cases, where a "neutral third party" organises and manages negotiations between the parties. There is also virtually no discussion of such procedures in academic or practical circles, nor has any interest group or other institution as yet begun to call for their increased use.

In these countries, which belong among the global progressives in environmental policy, the significant actor groups clearly consider an improvement in existing environmental policy instruments to be sufficient for resolving large-scale environmental conflicts more effectively (cf. Hanf & Koppen in this book). Moreover, the important institutions in political opinion-forming and decision making are characterised by great openness in environmental questions (cf. Andersen in this book); at the same time, apart from in Sweden, the environmental organisations are deeply integrated into the decision making system. The widespread existence of co-operative procedures—e.g. consensus conferences, policy dialogues, "covenants" (voluntary environmental agreements)—protects against the emergence of difficult conflictual situations. Thus for example in the Netherlands, two complex consensus conferences on genetic engineering and nature conservation have been conducted—in response to similar conferences in Denmark; furthermore, there was also a strongly participative national debate on energy policy in 1981-1983, organised by an independent and pluralistically constituted steering committee (cf. Midden 1995). In Sweden, however, environmental organisations are working towards direct bilateral negotiations with companies, although they are also using the courts to bring about a readiness to negotiate (cf. Gillberg & Hydén in this book). At present, this is considered more effective than conducting complex mediation procedures.



### 5.8 *Italy*

Mediation procedures have been conducted in a few cases in Italy, and predominantly with little success, sometimes also in preparation for complicated planning procedures. The approach has its supporters mainly in private planning and consulting agencies and in environmental organisations. A significant increase in these procedures, or institutional and legal measures for their support, is therefore thought by experts to be rather unlikely in the short to medium term (cf. Lewanski in this book).

### 5.9 *Great Britain*

ADR procedures played no role in Great Britain's environmental policy until recently. The centralised government actors in environmental policy were (and the majority still are) predominantly hostile to the approach (cf. Boehmer-Christiansen in this book). The opinion was clearly that the negotiation-based, highly co-operative policy style represented an adequate regulatory approach—turning a blind eye to the exceptionally small chances for participation enjoyed as a rule by "third parties" (cf. Weale 1997). The close co-operation on environmental matters typical for Great Britain takes place almost exclusively—and within the framework of legal provisions guaranteeing a great deal of flexibility in this respect—between the responsible authorities and their addressees, sometimes in such an opaque procedure that talk is of a "cosy relationship" between these actors. It should also be noted that there is comparatively (for Europe) little environmental policy pressure from within society in Great Britain (with the exception of road and airport construction projects), very little involvement by the courts in environmental policy conflict and scarcely any demand for ADR procedures from environmental organisations or for the establishment of other such procedures. In larger environmental conflicts regarding planning, the extremely complex "public inquiry" is generally used in England, although the "independent" director of the procedure is nominated by the Ministry of the Environment. However, in connection with Local Agenda 21 activities and as a result of increasing efforts to strengthen local democracy, interest in collaborative approaches is slowly growing.

Given this situation, it is somewhat surprising that there are three organisations in Great Britain specialising among other things in environmental mediation, the smaller Unit Environmental Resolve at The Environment Council, an independent charity organisation, the very large "Centre for Dispute Resolution", set up in 1990 with the support of the Confederacy of British Industry (CBI), and the ADR Group, the latter two also offering training programmes and environmental mediation services, although with limited success in the field of the environment—which is not the case for their use in commercial disputes. In the opinion of experts

working (infrequently) in practice, ADR is becoming increasingly popular in environmental issues, whereas environmental policy researchers predict only poor chances for growth in the near future. They believe that ADR would only have a better chance in the context of the environment if environmental policy became more legally institutionalised and the courts thereby became more involved. But this, they argue, is plainly a long way off in Great Britain, even if certain trends in this direction can be made out in consequence of the influence of EU environmental legislation (cf. Boehmer-Christiansen in this book).

### *5.10 Germany*

The situation in Germany with regard to ADR has now been well documented (cf. Claus & Wiedemann 1994, AGU 1994, 1995; MEDIATOR 1996, Claus & Voßbürger in this book). It might be said that, after the two great "pioneer procedures", in Neuss (cf. Weidner & Fietkau in this book), and the "Münchehagen Mediation" (cf. Dally, Weidner & Fietkau 1994), and after a hesitant start, much mistrust and predominantly abstract, fundamentalist debate on such procedures, they are now finding their feet in all areas of environmental policy. This is especially the case at local and regional administrative levels, where environmental policy is implemented. But even state policy institutions—such as the environment ministries in Lower Saxony, Schleswig-Holstein, Brandenburg and Berlin, to name but a few—are promoting an "experiment in environmental mediation". The foundation Deutsche Bundesstiftung Umwelt [German Federal Foundation for Environment] has been channelling considerable funds since 1997 into a project intended to test and improve the possibilities for applying mediation in co-operation with the relevant social groups and organisations and systematically to conduct and promote education, training and research in this area. The trend towards ADR is also favoured by the increasing arrival of a new, more result-oriented type of environmental administrator in the state and local administrations. Because of their upbringing, education and commitment to the environment, these administrators are less and less shy of co-operating closely with environmental groups or the use of innovative instruments.

The overview of the state of and trends in ADR in Germany shows—without claiming to be exhaustive, as small to medium-sized mediation procedures are hardly heard of outside their own regions—that mediations and similar procedures are being used in connection with land use, environmental impact assessment, planning, licensing and clean-up, and more frequently with waste policy issues (cf. Claus & Voßbürger and Claus, Gremler & Wiedemann in this book). One interesting example was the moderated scientific discussion of the risks of genetic engineering in crop protection (cf. van den Daele in this book).

Since 1990, about 50 ADR procedures (supported by moderators, facilitators or mediators) have been documented (MEDIATOR 1996). Since only relatively few ADR procedures have yet been concluded fully—some have also been abandoned—it is difficult at present to make general statements on the conditions for success or failure. What can already be said is that the most important factors include the neutrality of the mediator and a conscientious, unbiased and independent examination of the case, as to whether it offers enough room for manoeuvre. Inasmuch as corresponding studies have been conducted, the majority of participants in alternative procedures have been relatively satisfied with the conduct and the outcome. A great many of them would also recommend such procedures in other conflict situations. The small number of "classically" conceived mediations can be attributed to the associated effort required from the participants, difficulties in solving the problem of funding, and problems with linking the procedures to both formal procedures and political decision making processes within existing networks of interests. Some of these problems can, through further experimental learning and legal or institutional support, be solved, or at any rate reduced to such an extent that an increase in mediation procedures certainly appears realistic. All the same, because of the still great difficulties, but also because there are many more appropriate procedural forms in terms of cost-benefit available within the broad spectrum of ADR, they will probably not play a quantitatively outstanding role in German environmental policy.

In especially intractable conflict situations, or where the parties have much to lose, or where co-operation is a *sine qua non* for the project (e.g. Local Agendas on Sustainability), ADR procedures will probably be used to an increasing extent in future. Support for ADR by significant actor groups will presumably also contribute to their spread. There are now proponents in independent environmental committees (such as the national Council of Environmental Experts), within law studies and in the environmental policy and administrative system, for example the Federal Ministry for the Environment. This is not only because there have now been some relatively successful procedures, but also as a result of the general debate on environmental policy instruments, where negotiation-based co-operative procedures are gaining increasing favour. In German environmental policy studies, ADR procedures, a new type of co-operative, consensus-oriented environmental policy instrument, were in any case supported at a relatively early stage as a promising means of modernising environmental policy, or even "democracy" itself (cf. Zilleßen, Diemel & Strubelt 1993, Jänicke 1993). The number of private consulting and other organisations offering mediation or similar services has at any rate risen sharply, there are also some with the word mediation explicitly included in their names. And an association for environmental mediation was recently established, to represent the interests of mediators and develop professional standards—a codex for good mediation practice has already been set

out by experts in mediation (the so-called Loccum Codex, named after the town Loccum where it was established). Almost all indicators imply that environmental mediation in Germany will continue to increase (if a little more slowly than its proponents might wish), and will probably soon receive stronger legal and institutional support (e.g. through amendments to existing, or by inclusion in new laws).

### 5.11 *Brief Résumé*

The above shows that there is no clear general factor which might explain the differences or similarities between the uses of ADR in the various countries. Neither the problem pressure theory, the problem perception theory, the political weight of environmental interest groups, the level of economic development, the form of environmental policy approach nor the particularities of state structures, governmental systems or the modernity theory can systematically provide a complete explanation for the cross-national variances in the application of these procedures. Even the most obvious factor, the specific types of institutionalised political and social interest mediation structures, is of little help in the search for a constant: there is significant variance in the use of ADR among co-operative and consensual neocorporatist systems (such as Germany, Austria, Sweden and Denmark) and among highly fragmented competitive systems (Great Britain, the USA, Italy). One particular tendency does nonetheless emerge, in that—with the exception of Germany—front-runners in environmental policy (the Netherlands, Denmark and Sweden) generally have scant need for ADR procedures. Here, potential for conflict can apparently be resolved by the interplay of integrative and participatory policy formulation processes with broadly accepted formal decision making procedures.

The prominent role of the courts throughout the field of US environmental politics, partly encouraged by the environmental organisations' wide-ranging legal rights of action, is presumably a decisive factor explaining the "boom" in ADR from the 1970s onwards. Conventional US procedures for managing environmental conflicts (and for administrative standard setting) are generally characterised as being costly, formal, confrontational, litigious, and unusually open to participation. For the majority of these characteristics, this is also the case in Germany, with one important exception: procedures here are considerably less open to participation, particularly by individual affected parties or environmental and citizens' groups. This applies both to environmental law-making, the administrative procedures for implementing legislation through regulations, standard setting, etc., and also to the possibilities for groups and individuals to mobilise the courts in their interests (cf. Rehbinder 1992, Rose-Ackerman 1995).

Perhaps the clearest contrast with respect to environmental policy making and implementation lies in the important role which the courts play in Germany and the USA. In the latter, virtually all important administrative decisions are subject to extensive judicial review. This is primarily a consequence of the philosophy of a strict separation of powers (legislative, executive, judicative) and of "checks and balances", as well as in the peculiarities of the American state structure, which mostly results in unclear and contradictory laws being passed by Congress, which must then be rendered coherent and implemented by the administration. In order to be able to control the very broad discretionary powers gained by the administration during implementation, and to hold them within democratic norms, highly complex decision making procedures (as in the Administrative Procedures Act) have been provided, open to societal groups and to a great extent susceptible to control by the courts. It might be said that the legislator allows the judiciary to examine the decisions of the executive for their consistency with material law against an "arbitrary and capricious standard", and to maintain the infallibility of the administrative system. In addition the Freedom of Information Act gives societal actors access to the greater part of the information available to the administration.

Thus environmental regulations in the USA are subject to possible judicial review even before the implementation phase, and private organisations who might be affected by their execution are granted wide-ranging opportunities for participation and civil action. In Germany, however, with a very few rare exceptions, judicial review of administrative implementation is not possible before its execution, which is similarly the case for administrative and legislative standard setting procedures (cf. Rose-Ackerman 1995).

Most US environmental law additionally gives individuals and organisations wide-ranging opportunities to pursue polluting companies and the responsible authorities through the courts. Since the settlements in these cases are virtually without a ceiling—or rather there are sometimes even financial incentives (e.g. the payment of compensation to environmental organisations) to file suit—there is much judicial intervention at the levels of standard-setting and implementation. Many of the independent environmental organisations in the USA therefore provide employment for a considerable number of lawyers—in fact institutions specialising particularly in environmental cases (e.g. Natural Resources Defense Council, Environmental Action) have been established and actions against polluters have turned into a significant source of income for law offices (cf. Rose-Ackerman 1995).

Such extensive rights of participation and legal action, as well as the related (financial and informational) support measures do not exist in Germany, nor in the other countries covered in this reader. This would seem to explain to a great extent the USA's outstanding record in the use of ADR: the legal opportunities for

blocking administrative and investment decision are far greater here, as is the negotiating power of the environmental organisations.

These generalisations on the development of ADR in various countries nonetheless come with one serious methodological reservation. It concerns above all the relatively small number of these procedures, even in the most enthusiastic countries, such as the USA where, measured against the number of standard procedures, the numbers are still trivial. This makes empirically justifiable generalisations somewhat difficult. On the other hand, these procedures are predominantly used in hard cases where the established instruments have failed or where this is thought likely. In this respect they are held in many countries to be appropriate auxiliary instruments for cases "at the end of the line". It is therefore rather unlikely that they will become everyday instruments of environmental policy, but it may be assumed that they will become somewhat more numerous, even in countries (like the UK) where framework conditions are restrictive.

## 6 Summing up with Some Suggestions

Alternative dispute resolution procedures in environmental issues—which include, alongside mediation, principally facilitated negotiations and policy dialogues—have developed, above all in the USA—into a well-honed approach to dispute resolution. They are described as "alternative" because, in contrast to conventional, formal, procedures, they are based on the voluntary participation of parties who define their own procedural rules and goals, and on the fact that the outcome is not a priori formally binding. They are not a replacement, but a complement to formal procedures.

Modern research into policy studies and state theory does not reject conventional instruments—they have proved very successful in certain areas of environmental policy (cf. Jänicke & Weidner 1995, 1997). It does, however, believe that under the democratic, pluralistic circumstances of complex industrialised societies, "softer" forms of control, mostly based on negotiation, are more appropriate for managing problems which affect the whole of society, which require the co-operation (or obedience) of sub-systems, and which cannot be solved through "the evolution of society" or by unleashing market forces. Current opinion in political science holds that appropriate forms of control in today's society are contextual framework control, informational and procedural control as well as consensual and dialogue-oriented arrangements. "New instruments which are flexible and promote co-operation and consensus are what the state needs" sums up the general tone to be heard throughout the broad theoretical policy debate, one which was stimulated by a good deal of input from environmental policy research. The barriers to a greater use of approaches based on these central forms, which

lead to greater participation by environmental groups, are extremely high in countries with an old-fashioned (centralistic, bureaucracy-dominated) policy style, as the examples of the UK and Italy show, and as was still the case in Germany some years ago. Nonetheless, in the wake of the rise of the new paradigm "sustainable development"—which at heart requires an equal consideration of social, economic and environmental needs—the values of consensus, co-operation and negotiation have increased within environmental polity, and the globalisation of the economy, with the particular significance of global environmental problems, is making it increasingly clear that conventional policy procedures and litigation are severely limited in their actual effects, as they were still developed within a sovereign and autonomous nation state.

American experience with environmental mediation, the procedural type which has proven to be well-suited to complex, large-scale environmental conflicts, has strongly influenced developments in many other countries. This is especially the case with procedural design and mediation techniques. As has been the case in other environmental issues—such as forms of institutionalisation, regulatory instruments, strategies, abatement technologies—it is now possible to speak of a dynamic global process of learning and diffusion, which is leading to a meaningful extension and refinement of environmental policy instruments (cf. Jänicke & Weidner 1997: 300 ff.).

At a time where the development of global economic and environmental problems means that the scale of environmental tasks is growing at the same time as restrictions on environmental policy are increasing, there is particular need for instruments which avoid unproductive conflict, increase efficiency and bring socially and environmentally more acceptable results. The proponents of ADR, whose numbers are growing slowly but surely, stress that ADR procedures will lead as a rule to greater efficiency, more fairness, better outcomes, win-win solutions and will in the long term enhance democracy.

Such high hopes are nevertheless seldom fulfilled, as these overviews and case studies from twelve countries show. That being said, numerous advantages over conventional procedures are apparent, so that a further, albeit slow spread of ADR can be expected, despite the often ambivalent experiences to date. These consist, among other things, of there frequently being no overall consensus between all parties to the conflict, but rather a partial consensus, even though this is often reached in significant and previously divisive areas. Continuing growth can also be expected because these approaches chime with a globally recognisable trend towards increased use of negotiation and co-operation in environmental politics.

Another barrier to a massive growth in ADR is that it requires a great many preconditions to be met: preparation and conduct of an ADR procedure is often associated with considerable financial and physical costs to the participants. It is

only rarely that there is a noticeable saving in time compared with conventional procedures—at least in the short to medium term. Moreover, ADR is by no means resistant to exogenous influence (such as legal and material changes in the situative context of the mediation). In many countries, the use of financial or material compensation as bartering goods is so strictly taboo that room for negotiation is relatively scarce. The representatives of environmental organisations find it especially difficult to commit their constituency to agreements reached, but the linkage of the procedural outcome to the standard political and administrative process also causes problems in many countries.

Not all, but a great many of these restrictions and disruptive factors can clearly be removed with an improvement in mediation techniques and legal institutional support, as is shown particularly in the cases of the USA and Canada. There, for example, federal and state laws now regulate some fields of application for ADR, the selection criteria for mediators and the translation of the outcome into formal procedures. A significant condition for the successful propagation of mediation procedures in countries with a high level of environmental policy conflict would therefore appear to be the existence of adventurous, innovative political and administrative institutions which support self-regulation within society with carefully targeted hierarchical measures, rather than hinder them. On the other hand it seems hard to strike a balance between the regulation or institutionalisation of ADR and the requirements of flexibility, since individual cases in the USA are already pointing up the disadvantages of excessive institutionalisation.

The cross-national overview shows Germany behind the USA, Canada and (the culturally unique case of) Japan in fourth place as a user of ADR, especially mediation, although clearly with the most highly-developed practical expertise and institutional infrastructure for mediation within Europe. However, the professionalisation and institutionalisation of these procedures is clearly still in its infancy, compared to the USA and Canada. This is true to an even greater extent in the rest of Europe, with the possible exception of the UK, where there may be scarcely any ADR procedures, but there have long been specialist institutions in the field. It should also be remembered that the USA and Canada can look back on a far longer history of ADR development—and are still unable to solve satisfactorily numerous problems in organising and conducting alternative dispute resolution procedures.

In view of the current state of research it is probably not possible to make a conclusive, balanced and empirically sound assessment of the substantial advantages and disadvantages or, more generally, risks and opportunities, of ADR procedures. Examination of the relevant literature on this conflict resolution instrument in environmental issues reveals that the advocates, or at least the most prominent ones, tend generally to foreground the positive aspects of mediation or to consider that it will, in the long-term, be possible to overcome its obvious failings



by improving the instrument itself. Those who are fundamentally critical, a clear minority, tend on the other hand to over-emphasise individual failures and to generalise from them.

There is still more bias contained in the arguments of proponents and those who reject ADR. The following can be found relatively frequently. Leaving aside for the moment those proponents who paint a rosy picture of the situation for their own private interests, there still remains a substantial number of supporters who

- underestimate the capacity for reform of existing (conventional) institutions and procedures and the opportunities inherent in "modern" instruments (e.g. eco-audits, covenants);
- overestimate the intrinsic motivation and capacity of actors to give of their time and energy through intensive participation in ADR processes which often impinge on leisure time (this is especially the case for actors who, because of their work or area of responsibility, would be more frequently involved in ADR if it became considerably more widespread);
- assess the environmental policy process too much according to the characteristics and workings of single instruments, and thereby undervalue the complex interplay between capacity building elements, such as values, interests, discourses, knowledge, resources as well as changing situations and structures, all of which shapes the domestic policy outcome and impact far more than individual management tools (thus the heated debate on regulatory policy versus consensual negotiation is just as one-sided as the earlier dichotomy between command-and-control and economic incentive instruments);
- put too much faith in the power of "free and rational communication" to transform power structures which formed under irrational principles, despite the current trend towards individualism, social exclusion and stiff competition within and between many countries.

If, turning to those who reject ADR, we ignore those who cultivate a radical image or seek to exploit their uncompromising approach in the pursuit of some other social or environmental ideal, then rejection is frequently based on their

- idealised view of the possibilities (and ignorance or relativising of the often weak, unproductive results) of traditional procedures;
- measuring the results of ADR procedures to date too much against an abstract ideal of ADR, from which solutions to virtually every social and environmental policy problem (from social inequality, through democratisation, to environmental justice across generations and national divides) are demanded at a stroke;

- ignoring (analogously to some proponents) the relatively small quantitative and qualitative significance of this class of conflict resolution mode within the entire environmental policy process;
- frequently short-term orientation with respect to their expectations of success from what is in many countries still a very recent development, ignoring, the results of policy analysis and policy learning studies, which have shown that new instruments often take at least a decade to function systematically (cf. Sabatier & Jenkins-Smith 1993), and where instruments based on a (voluntary) process of social change generally require a longer incubation period than conventional instruments;
- lack of genuine interest in (and more often than not, their lack of empirical knowledge about) real-life environmental policy problems and ADR procedures—this applies, however, almost exclusively to members of the scientific community—and more in artificially making the issues more complicated than they are (sometimes reminiscent of scholastic exercises), a practice which is less than rare in academic circles.

Common to both sides is that they make generalised, universal statements about the chances for and problems of ADR in the environmental arena in highly industrialised societies which are based predominantly on experience within the political system of the USA. This is bound to be the case, since—with the exception of Japan and possibly Canada—other countries have had only rudimentary experience with these approaches. Finally, it is obvious that critics in particular, but also to a significant extent proponents, are not basing their statements on their own empirical research in this area or, when they do use empirical data, relying too heavily on analyses and evaluations made by persons involved with conducting ADR. In general it can be said that there is a serious lack of comprehensive case studies carried out by independent social researchers with the complex methods appropriate to such procedures. Such evaluation methods are still pretty much under development, but it is already becoming clear that, firstly, the established criteria of environmental policy evaluation (cf. Bartlett 1994, Fischer 1995, Bussmann, Klöti & Knoepfel 1997) are not adequate, since subjective elements (e.g. assessment by those participating directly) must be registered and, secondly, such evaluations will require a great deal of effort to carry out, and therefore issues of practicability must be considered systematically at the conceptual stage. It is thus with articles on environmental dispute resolution, where it can currently be maintained, as with studies on mediation in general: "Of the articles published in the past decade, we found about 50 per cent are based on the author's ideas, opinions, and informal observations. Only half are data-based" (Wall & Lynn 1993: 187).

## 7 25 Years of ADR in Environmental Conflicts

If one takes the Snoqualmie River case (mediated by Gerald W. Cormick and Jane McCarthy) to be the starting point in the growth of (alternative) environmental dispute resolution, then the systematic use of ADR in environmental conflicts has now been developing for a quarter of a century. During this period, there has been rapid growth of ADR at all levels of state and in virtually all areas of environmental policy in the USA, compared internationally. In striking contrast to the rapid international diffusion of other institutional and instrumental environmental policy innovation from the USA, ADR has—with the exception of Canada—taken a long time to be discussed and applied to a significant extent in other countries. Even today, the number of ADR procedures in other countries is relatively small. But there are clear signs that they will enjoy broader application in future. In the resolution of international environmental conflicts also, ADR is growing (cf. Moore 1996, Salem 1993, Bercovitch & Rubin 1992). Nonetheless, there are no indications of a coming ADR "boom" comparable to that in the USA. The reasons, as mentioned above, are manifold, and no common denominator can be found among the twelve countries examined here to explain these differences. But one decisive factor is clearly the special political, administrative and legal situation in the USA, which is driving the development of a "litigious society" in environmental matters also. ADR was therefore born not as a "nice idea" for democratising society, but out of necessity, to "break the impasse", to paraphrase the title of a classic textbook on the subject (Susskind & Cruikshank 1987). Similarly to the way highly specialised experts and organisations (some with a clear commercial interest) have established themselves in the boom field of adversarial processes, there has been an "alternative" professionalisation of ADR (mediators, etc.), which has now equally established itself institutionally and is seeking to expand its markets (in partial competition with the lawyer-dominated market of litigation). Lawyers now, sometimes frustrated by the nightmares of litigation, sometimes with an eye to commercial expansion, are increasingly coming to specialise in ADR in the environmental arena, with which they have long been familiar in other areas of law.

This increase in well-organised proponents of ADR from a wide variety of professional environments (including universities), has certainly made a string contribution to the spread of ADR in the USA. In other countries, again with the exception of Canada, this institutionalised professionalisation is still in its infancy, but even here, alongside environmental policy experts, psychologists, environmental engineers, etc., lawyers are also starting to discover the new market of ADR, particularly in the UK and Germany. This also will presumably lead to some growth in the use of these procedures. The fact that growth rates will, in all probability, never reach those of the USA is because among other things, European countries

already possess many varied co-operative forms of environmental policy making (cf. Jänicke & Weidner 1995, 1997) on the one hand, and on the other, the opportunities for intervention through the courts are more limited, so that such an extreme trend towards the litigious society with respect to the environment as in the USA is unlikely. However, here also environmental conflicts in areas which are sensitive in respect of economic development are on the increase, as well as legal arguments. Thus, in cases where existing co-operative networks and neo-corporatist interest mediation mechanisms are inadequate to prevent conflict, or where arguing the case in court is thought by the parties to be too risky, the use of ADR will appear sensible to the relevant actor groups (cf. for Germany: Weidner 1996b).

The country studies in this book reveal furthermore that the suitability of ADR with respect to the characteristics and prior history of environmental disputes as well as to the plurality of the involved actor groups is almost unlimited. Even if it is often pointed out that the conflict should not become so serious as to warrant the use of ADR, there are numerous counter-examples of its being the development of an impasse which gave rise to its use, and where the success rates are not significantly different to procedures used preventively before a conflict situation began to arise. Some experts even maintain that ADR should generally only be used after conventional instruments have been exhausted and failed to bring matters to a satisfactory conclusion. On the other hand, it is important for there to be sufficient room for negotiation for every actor group. There is nonetheless increasing support for the use of ADR even before the conflict emerges (cf. IEN/RESOLVE 1994, Bush & Folger 1995).

Experts are virtually unanimous in the opinion that ADR is not suitable for value conflicts. The construction and siting of nuclear power stations or of sites and plants for nuclear waste treatment or disposal are often cited as examples of value conflicts, sometimes also toxic waste disposal plants. But even in these areas, extremely hotly disputed in many countries, there have been occasional consensus-oriented negotiations around the edges of the core conflict: in Switzerland, for example, the "Conflict Resolution Group on Radioactive Waste" ["Konfliktlösungsgruppe radioaktive Abfälle", KORA] was moderated by a neutral third party, and even representatives of the environmental organisations participated. It may have failed, but not for procedural reasons, rather due to external influence. It was the decision taken during the procedure by the federal government to permit an increase in capacity in an existing nuclear power plant which drove the environmental organisations' representatives out of the procedure, so to speak (cf. Wälti and Enderlin Cavigelli in this book).

In Germany also, a debate has arisen within environmental organisations as to whether a general uncompromising opposition to the storage of nuclear waste is a sensible strategy, as this stimulates the export of waste. So-called consensus discussions on energy policy ("energy dialogue") have up to now only taken place

with the participation of party political representatives (and without the participation of the Greens), but these have been primarily exploited in order to put party political positions before the public (cf. Barthe & Brand 1996).

## 8 Room for Research

It is clear from the articles in this reader, as well as from the overall debate on theory, methods and practice in ADR, that there are still very many questions to which there are at present no satisfactory answers from a sociological perspective, partly because they are fairly often based on methodically unsound and abstract considerations, or on the results of laboratory experiments and cases of interpersonal dispute resolution, which cannot be translated wholesale onto complex multiparty public disputes. Alongside the "big" general theories on the significance of ADR for a democratisation of environmental policy and society as a whole (cf. Dryzeck 1997, Saretzki 1997, Schmalz-Bruns 1995), there are clearly particularly important problem areas which continually make themselves felt in the day-to-day practice of ADR and are the cause of numerous disputes. These are above all the following outstanding questions, which require the application of social (especially political) science for their answers:

- Even though ADR, because of its particular mechanisms, leads with greater likelihood to a win-win situation for all participating actor groups when compared with conventional, especially adversarial procedures, this does not necessarily mean that all participants win the same amount. Particularly in siting conflicts, an absolutely equal sharing of cost and benefit is, objectively speaking (and, for the participants and others affected, subjectively) impossible. A probably unavoidable means of reducing this dilemma and remaining true to the central ADR principle of fair shares is compensation. These can theoretically take a variety of forms, but discussion in practice appears to concentrate predominantly on a number of specific forms: financial transfer, the establishment of public facilities (mostly limited to especially hardly hit areas), privileges of use for those directly affected. These forms of compensation are often greeted with criticism from both participants and—in particular—those outside the procedure, criticism directed against direct financial rewards for individuals is naturally especially vehement. Essentially, it is true that compensation is a virtual taboo subject in every country—with the possible exception of Japan. Yet there is not only the problem that compensation almost always brings with it the stench of having bought out legitimate interests, or sold out one's environmental values, but also the difficulty of preventing the emergence of illegitimate greed. A systematic analysis of the entire conceivable spectrum of possible compensation

ought to be conducted, and the suitability of specific forms assigned to types of environmental conflict (cf. Suhr 1990, O'Hare 1990, Kunreuther 1995, Holzinger 1997). Alongside the conduct of empirical experiments (and evaluating existing cases), a scientifically organised, broad professional and public debate on all aspects of compensation, in particular moral issues, should be set in motion, studied and evaluated. Research to date in this field is only sketchy and to a great extent speculative, too much oriented around economical aspects or theoretical models.

- Normally it is only the representatives of organised interest groups who take part in ADR procedures, the general public and the fourth estate (now taking its place among the judiciary, legislature and executive)—the media—are mostly excluded from continual participation. This has shown itself to be generally functional in respect of the internal processes, however, this detracts not only from general legitimation and acceptance of the procedure, but also leads to occasional, very considerable and procedurally counterproductive disputes with groups outside the procedure, and puts the environmental organisations in a precarious position, as one of their most important sources of power is in mobilisation of the press (and they therefore have a particular interest in maintaining close ties). Although practical—and highly varied—solutions are mostly found to the problem of media participation in concrete ADR procedures, in the face of the great importance attached to the topics of "transparency" and "democratic controls" some theoretically based empirical research in the subject would have special importance. This applies beyond the field of environmental policy, in the face of trends in many countries towards a "negotiating state" and the increasing significance of informal processes not based on legally regulated or scrutinisable procedures at an international level (e.g. the influence of "epistemic communities" on international regimes).
- It is considered certain that value conflicts are not appropriate subjects for ADR. However, in practice there are (still weak) trends to involve areas of conflict in such procedures where there is "linkage" to value conflicts. There is also some plausibility in the idea that value conflicts are not fixed for all time. As a consequence of developments within society and new discoveries, but also as a result of strategic shifts by important actor groups, there may be (as in genetic engineering) "slippage" in former positions. These processes of alteration have not yet been systematically analysed. In addition, it might be assumed that ADR itself could contribute to such alterations (de-fundamentalising positions), if only in (very small) ways which are correspondingly hard to measure (cf. the discussion of rationality gains through moderated discourse in Bora & van den Daele 1997, Döbert 1997).

- ADR procedures are fragile structures, partly because they are based on the voluntary participation of actors who have the option of walking out at any time. But they are also dependent to a great extent on exogenous developments beyond the control of the participants, for example inter-regional or national policy decisions and legal developments. The important stockholders here cannot generally be brought into the dispute management process, which is restricted in range and scope. On the other hand, local experiments and innovation can have a stimulating effect on national processes, where they are slotted into one another appropriately. The possibilities for productively embedding locally restricted ADR procedures in supra-regional institutionalised (conventional) processes—where a significant potential for interdependency exists—have by no means been adequately studied either from a legal or from a sociological perspective.
- Many issues are considered too complex to be handled usefully with ADR, for a variety of reasons (large numbers of affected parties, lack of scientific knowledge, large geographical spread, covering a number of administrative areas). This kind of "over-complicated" major conflict is, however, no rarity in environmental matters. In this respect it would be interesting, particularly from a practice-oriented perspective, to study the extent to which such large conflicts might be "partialised" and dealt with through a number of different ADR procedures, although the subsequent reassembly of the overall issue must of course also be taken into account. Early practical tests and isolated social scientific studies have been carried out (e.g. on the planning and siting of a an international airport in the area of Berlin-Brandenburg in Germany, cf. Barbian 1994: 85 f.), and have provided helpful stimuli for researchers, but they have to the best of my knowledge as yet to be taken up by the social science community and carried over into systematic research projects.
- After the conclusion of an ADR procedure there is almost always argument or serious uncertainty among participants and non-participants as to how the procedure and its outcome should be evaluated. Was it a success or a failure? A strong tendency to focus on the natural environment and the environmental groups can be observed, whereby they are classed as ("innocent") losers in the case of any compromise. In principle it is assumed that the environmental groups can be relatively easily manipulated and thereby outmanœuvred by the far better resourced representatives of business and the administration, with their training in negotiation and communication techniques. However, there is little evidence in the empirical literature that this actually takes place systematically without the death of the procedures. As a result of their long drawn-out development and great experience, the representatives of environmental organisations have accumulated a great deal of expert knowledge and are sufficiently

sophisticated to be able to recognise systematic discrimination or manipulation soon enough. They are nevertheless under extremely high external pressure to negotiate the best possible deal for the environment. In this respect they are—as the advocates of a healthy, untainted environment—essentially from the first moment on in a "losing" position; for outsiders, who tend to measure real-life outcomes against idealised pictures of possible results, they are at any rate almost always the losers. In addition to this comes the fact that the representatives of environmental organisations, because of their particular constituencies and their publicity strategies (including fund-raising), find it hard to report compromised or partial successes positively. With this complicated conglomerate of evaluation perspectives, an urgent scientific task would be the development of detailed, generally acceptable criteria for evaluating ADR procedures. Preliminary, but by no means sufficient, work has already been carried out (cf. Renn, Webler & Wiedemann 1995). This was seen also in the round table discussion on the definition of success in public policy dispute resolution between practising mediators and researchers, which took place in Washington DC in June 1997—organised by RESOLVE and the National Institute for Dispute Resolution (NIDR). Furthermore, a comprehensive study based on written and oral questions to participants and outsiders, as well as on systematic (controlled) participatory observation by a multidisciplinary research team and a content analysis of recordings of the negotiations (cf. Weidner & Fietkau in this book and Fietkau & Weidner 1998), has shown that, because of the widely varying assessments by participants and outsiders, it would be neither possible nor meaningful to evaluate the results of ADR procedures (as to substance, process and relationships) on only one "scale".

All of the above research question offer themselves as subjects for comparative, cross-cultural and multi-disciplinary studies, probably in the form of "joint projects". Such interdisciplinary research has to my knowledge never yet been conducted systematically (e.g. with a jointly developed theoretical basis research design). And this would be an excellent approach for discovering any culturally specific characteristics in the use of ADR, gaining a (particularly practice-oriented) overview of the wide variety of conflict management techniques, stimulating the (as seen from the countries studied here, still very slow) international diffusion of ADR procedures and finally developing the theoretical basis for this promising field of non-adversarial, negotiation-based management of environmental conflicts.



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