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Working Paper — Digitized Version

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WZB Discussion Paper, No. FS II 93-301

Provided in Cooperation with:

WZB Berlin Social Science Center

Suggested Citation: Weidner, Helmut (1993) : Mediation as a policy instrument for resolving environmental disputes: With special reference to Germany, WZB Discussion Paper, No. FS II 93-301, Wissenschaftszentrum Berlin für Sozialforschung (WZB), Berlin

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<https://hdl.handle.net/10419/77618>

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WZB

WISSENSCHAFTSZENTRUM BERLIN
FÜR SOZIALFORSCHUNG

FS II 93-301

**Mediation as a Policy Instrument
for Resolving Environmental Disputes
- With Special Reference to Germany**

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W 188 (93.301)



papers

Forschungsschwerpunkt
Technik
Arbeit
Umwelt

MEDIATION AS A POLICY INSTRUMENT FOR RESOLVING ENVIRONMENTAL DISPUTES - WITH SPECIAL REFERENCE TO GERMANY

Abstract

Environmental conflicts are on the increase in all democratic industrial societies. In some areas, especially those involving big technology development projects, there is growing resistance to government intervention using conventional policy instruments. Therefore, political administrations and business have begun to accept the idea of experimenting with so-called alternative forms of conflict resolution, in particular, those based upon *negotiation*. In the United States, Japan, and Canada one such procedure, mediation, has come into wider use and proven successful in practice. This article describes several mediation procedures, mostly in the United States, but also including two examples of its application for resolving conflicts in the Federal Republic of Germany--one concerning a landfill site at Münchehagen and one concerning a waste management concept for the county [Kreis] of Neuss in the German Federal State of North Rhine-Westphalia. Finally, the question is raised in general as to whether and how mediation procedures could function as policy instruments in a modern state, and whether they are appropriate for dealing with major, but at the same time locally restricted cases of conflict. Regarding the Federal Republic of Germany in particular, more practical experience with mediation must be gained before we are able to draw general conclusions about its possible areas of application in this country and the conditions underlying its success.

MEDIATION ALS POLITIKINSTRUMENT ZUR BEILEGUNG VON UMWELTKONFLIKTEN - MIT BESONDERER BERÜCKSICHTIGUNG DER BUNDESREPUBLIK DEUTSCHLAND

Zusammenfassung

In allen demokratischen Industriegesellschaften nehmen die Umweltkonflikte zu. Einige Bereiche (besonders großtechnische Entwicklungsvorhaben betreffend) erweisen sich zunehmend resistenter gegen staatliche Steuerungsversuche mit konventionellen Politikinstrumenten. Das hat im politisch-administrativen System und in der Wirtschaft die Bereitschaft wachsen lassen, mit neuartigen, sog. alternativen Streitregelungsverfahren zu experimentieren. Sie beruhen in aller Regel auf *Verhandlungslösungen*. Eines davon, das *Mediationsverfahren*, hat sich in der Praxis - insbesondere in den USA, Japan und Kanada - als relativ erfolgreich erwiesen. Es wird in diesem Beitrag vor dem Hintergrund besonders der Erfahrungen in den USA beschrieben, weiterhin werden zwei Anwendungsfälle in der Bundesrepublik Deutschland (Mülldeponie Münchehagen, Abfallwirtschaftskonzept des Kreises Neuss) dargestellt. Schließlich wird der Frage nachgegangen, ob und in welcher Weise Mediationsverfahren als Politikinstrumente angesehen werden können. Die Studie kommt zu dem Ergebnis, daß Mediationsverfahren Politikinstrumente eines modernisierten Staates sind und besonders für große, jedoch lokal/regional überschaubare Konflikte geeignet sind. In der Bundesrepublik Deutschland sind allerdings noch mehr praktische Erfahrungen notwendig, um über Erfolgsvoraussetzungen und Anwendungsgebiete begründete allgemeinere Aussagen machen zu können.

0. Introduction

In past years some areas of environmental protection have proved to be particularly resistant, or even allergic, to any attempts by environmental policy-makers to exert control. This includes large industrial and public projects in virtually all democratic industrialised countries where people are afraid of their negative consequences for health and the environment. Because as a rule they are facilities and infrastructural projects which are crucial to the functioning of an industrialised society (projects such as landfills, waste incineration plants, airports, motorways, dams, power stations), disturbances which may be ecological in origin also cause major political and societal conflicts in which 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 the conventional instruments 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 is not dropped due to these conflicts, its realisation often becomes a very time-consuming and expensive business, the original objectives are watered down, the conflicts are shifted to 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 to implement their public policy objectives and responsibilities are proving in major environmental disputes to be increasingly unsuitable for achieving solutions which are not only economically viable, but also compatible with the environment and the wishes of society.

It is quite obvious 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 in the course 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 more a new secular trend in the most advanced industrialised countries. None of the groups involved in the conflicts is 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.

Everyone complains of the lack of appropriate instruments for mastering the challenge to implement 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 constantly growing increase in alternative forms of conflict management can be identified in certain countries, particularly within the governmental and industrial structures. Some countries even have many years of practical experience behind them: what is known as alternative dispute resolution is now well established in the U.S.A., Canada and Japan. In Europe, as I shall go on to point out, it leads only a shadowy existence; here we are still almost completely taken up by listening to the debate "unleashed" in the U.S.A. on economic environmental instruments and by considering putting them into practice, albeit hesitantly.¹

1. Alternative dispute resolution procedures

In the U.S.A. decision-making processes which complement traditional (formal) procedures are called "alternative dispute resolution procedures or approaches". The abbreviation ADR is commonly used. As the term "alternative" could give rise to misunderstandings, I should like to follow the example set in relevant literature on the topic and expressly point out that it does not refer to traditional procedures for conflict resolution or decision-making (such as parliamentary procedures or those undertaken by law courts or the public administration) being replaced but complemented by these new techniques. 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.²

All the various types of alternative procedure have one thing in common: they are intended to settle disputes - not necessarily 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, not a unilateral decision handed down from above that is binding whether the people concerned agree or not. These procedures are usually informal, i.e. the people taking part draw up the rules and regulations 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. the contributions of Sander, Gerdner in Hoffmann-Riem/Schmidt-Aßmann, vol. I, 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

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- 1 I find it of academic interest to ask whether European countries are generally less innovative than the U.S.A. when it comes to "inventing" instruments for implementing environmental policy and, if so, why. On the other hand, when it comes to implementation, some European countries seem to be more effective than the U.S.A.
 - 2 "These new tools of environmental conflict management and environment decision-making are understood as supplemental in legislative, regulatory and judicial processes" (Crowfoot/Wondolleck 1990: 13).

classification is the "degree of activity" with which independent people "intervene" in the procedure.

Classification of alternative procedures for settling disputes

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 conflict management (cf. Susskind/Cruikshank 1987). For procedures being carried out in practice a basic distinction is often made between public, private, conventional and alternative procedures. "Private" procedures are those in which conflicts without any public interest or without the involvement of public institutions are settled in a hierarchical way (for example arbitration negotiations to settle labour disputes). 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/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 regarding the subject of conflict. For example, the term policy dialogue is used to refer to the process of agreeing upon relevant social and economic basic rules (code 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". 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.

This is not the place to go into detail on the great range of terms used in the field of alternative conflict management which are becoming increasingly difficult to keep track of. This study is concerned solely with one of these forms: the mediation procedure. In this, as in other forms of ADR, negotiation plays a central role, with the difference that here an independent person organises and guides the negotiations. Correspondingly a distinction is made between "unassisted" and "assisted negotiation" depending on whether an independent person is involved or not. Mediation is a tool

especially used for resolving disputes involving environmental issues. It is the approach which will be under discussion in this paper.

2. Mediation procedures in the field of environmental conflict

Mediation as an informal and formal instrument for managing environmental conflicts was probably first used systematically in Japan, where the consensus-orientated political traditions generally support conciliatory procedures for settling disputes (cf. Tsuru/Weidner 1989).

However, its career as an alternative instrument for settling environmental disputes, an instrument which is now greatly discussed in Europe too, began in the U.S.A. Here this path was first followed in the mid-seventies in the field of the environment - it had already been used in the sixties to settle community disputes 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 in 1980 (cf. L. Dembart/R. Kwartler). 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 up successfully with a written agreement between about a dozen parties involved in the conflict.

This "pioneer procedure" was followed by others carried out by other people and by the beginning of the eighties the experimental phase was already concluded: mediation was institutionalised and professionalised. Mediation had evolved from being a promising experiment to being a widely accepted public policy option.

In many U.S. states there have been numerous private and semi-private mediation institutes for several years now which offer their mediation services and train mediators. Many of the major non-governmental environmental organisations (such as the World Wildlife Fund, Conservation Foundation) favour this procedure, some of them with great enthusiasm. It has also gained popularity and support in 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 even talk of a "mediation boom."

2.1 Developments in the U.S.A.

In the U.S.A., mediation procedures are 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, infrastructure programmes, law-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. A study carried out by Gail Bingham summarised this development as follows:

"Nationally, by the end of 1977, nine environment disputes had been mediated. Another eleven were mediated in 1978, and nineteen more were mediated in 1979. By mid-1984, mediators and facilitators had been employed in over 160 environmental disputes in the United States In addition, and relatively recently, the practice of environmental dispute resolution has grown beyond the resolution of disputes on a case-by-case basis to the institutionalisation, by statute, of procedures for resolving environmental disputes. Statutes in Massachusetts, Rhode Island, Texas, Virginia and Wisconsin authorise or even require negotiation of disputes over the siting of solid waste or hazardous waste facilities. A statute in Virginia specifies procedures for negotiation and mediation of intergovernmental disputes triggered by annexation proposals ...

Environmental dispute resolution techniques have been used to settle, or attempt to settle, a diverse assortment of conflicts. In general, however, the primary issues involved in these cases can be divided into six broad categories: land use, natural resource management and use of public lands, water resources, energy, air quality, and toxins. These categories can be subdivided into side-specific and general policy categories. (Side-specific disputes are over a particular project or plan; others involve disputes over questions of state or national environmental policy, that means general policy categories. Added by H.W.)" (Bingham 1986: xvii, 30)

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."

In what is probably the most comprehensive study to date of mediation procedures for settling environmental disputes (Bingham 1986) the balance sheet proves very positive for this procedure: of the 132 cases looked at, in which all parties were trying to negotiate agreement with one another, this aim was achieved in 103 cases (78 %). A large number of these agreements have also been implemented.

The generally positive results which Bingham identified in her analysis of case studies going back to 1984 are backed up by more recent studies (cf. Crowfoot/Wondolleck 1990 with their references for further reading). However, there are

also critical voices which claim that the positive effects of mediation 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 mediators themselves or by scientists from institutions kindly disposed to mediation (cf. Amy 1990, 1987, 1983 with further bibliographical references). I shall give an outline of the essential arguments for and against mediation. It will of necessity be brief.

Advocates of mediation as a rule focus on its advantages over conventional instruments for implementing environmental policy. They say that mediation procedures lead to fairer, more effective, efficient, rapid results which are acceptable to all parties to the conflict. Susskind and Cruikshank, for example, summarise the results of their own studies and those of others on alternative conflict resolution as follows:

"Based on the research and writing of a great many experts who studied the broad spectrum of disputes, we have identified four characteristics of a good negotiated settlement: fairness, efficiency, wisdom and stability. (1987: 21)

A particular advantage of mediation and other alternative methods of conflict resolution, they go on to say, is that, unlike conventional instruments which produce win/lose solutions, they produce all gain solutions.

A particularly important point is considered to be the potential of these procedures to initiate social and political learning processes which are to be welcomed especially from the point of view of democratic theory and societal 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)

Critics of mediation procedures point out a number of weak points using the example of individual case studies: the criticism is as a rule convincing but often applies only to the specific circumstances of the particular case from which deficits inherent to the instrument cannot necessarily be inferred. Nevertheless some inherent deficits are pointed out which evidently call the above-mentioned advantages into question. Douglas J. Amy summarised this fundamental criticism 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 environmental lists; and third, that EDR fosters a distorted understanding of the nature of environmental conflicts." (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 mediation, 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 promises, no truly broad 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 unresolvable dilemma is pointed out: The major environmental disputes were based on differing (and deep-rooted) values and principles which are fundamentally incompatible. This type of 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 nonnegotiable 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)

In view of the current state of research it is probably not possible to make a conclusive, balanced and empirically plausible judgement of the substantial advantages and disadvantages of mediation procedures. Examination of the relevant literature on this instrument of conflict resolution in environmental issues reveals that the advocates, or at least the most prominent ones, generally tend to push the positive aspects of mediation into the foreground or to consider that in the long-term it will be possible to overcome the obvious failures 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. In contrast to the advocates their direct empirical experience of these procedures seem to be more seldom and they have also carried out fewer empirical studies on the subject. Common to both sides is that they make generalised, universal statements about the chances for and problems of mediation procedures for settling environment disputes in highly industrialised societies which are based predominantly on the experience within the political system of the U.S.A. This is bound

to be the case, since - with the exception of Japan and possibly Canada - other countries have only had rudimentary experience with this instrument. Finally, it is obvious that critics and advocates alike in the U.S.A. take often fundamentally different attitudes (concepts, theories, ideologies) to the possibilities for ensuring or improving the ecological basis under existing political (capitalist) systems.

In other countries too, the discussion on this has by no means been concluded. In the Federal Republic of Germany, however, where a heated and sometimes very fundamentalist debate has been raging for 20 years, a consensus is gradually being formed amongst political scientists; the opinion developing is that in the course of a "modernisation of the state" a positive relationship between the market economy and the environment will become possible (in the form of an "eco-social market economy") (cf. Böhret 1992 and the discussion in Kohler-Koch 1992).

Society is often in practice not willing to wait for the outcome of this theoretical and ideological dispute. The use of mediation in the U.S.A. is constantly on the increase. Even Amy, one of the most severe critics of mediation 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) and in European countries there is growing interest in all areas of society; a few procedures have already been initiated. In 1992, with a time-lag of some twenty years, mediation has reached in Europe more or less the level in practice it had in the U.S.A. in 1975.

2.2 Developments in Europe and Japan

In comparison to the U.S.A., Japan and Canada too, mediation procedures are virgin territory in European countries both in terms of theory and practice. Mediation procedures in the "classical" sense, i.e. which follow the basic principles established in the U.S.A. are at best to be found in Germany, Austria, Switzerland and the Netherlands (cf. Fietkau/Weidner 1992; Knoepfel/Rey 1990; de Soet 1988) but even here the phase of implementation of an agreement resulting from a mediation procedure has to our knowledge not yet been reached. However, in the European countries mentioned and a substantial number of others too, other alternative forms of conflict settlement which involve negotiation and bargaining are common practice. This applies both to countries with a centralised structure and those which are organised decentrally particularly on the implementation level of government (e.g. Great Britain, Sweden and France).³

2.2.1 Japan

Throughout long centuries of isolation from foreign influence, independent, homogeneous forms of behaviour, social roles and a specific legal mentality formed in Japanese society which is very much a society of segregated groups. They still have considerable influence today. (Leubel et al. 1979) Traditionally, conflicts were not settled

³ This was shown at the conference "Comparative Research on Environmental Administration and Policy-Making", Drobak (Norway), 11-14 June 1992; organised by Alf-Inge Jansen (University of Bergen).

on the basis of the rights of the individual but primarily under the aspect of what the effect on the community would be. Conflicts were not dealt with on the basis of formally fixed methods for bringing them into the open to be settled but instead, in line with the Japanese desire for harmony, every attempt was made to avoid dispute and find a solution involving both sides giving in. As a rule conflicts within groups would be settled by mediation by other people or institutions.

As early as in the Tokugawa era traditional conciliation procedures (*naisai* or *atsukai*) were already highly developed. The role of a conciliator or mediator was taken on by people of high repute or social status. Although Japan thoroughly modernised its legal system on the lines of Western examples as part of the Meiji reform (or restoration) of 1868, current Japanese legal practice and mentality is still strongly influenced by tradition: correspondingly there is a wide range of procedures within and outside the legal system which permits disputes to be settled out-of-court. This is not only due to historical reasons. One of the reasons that the possibilities for settling disputes in court, which were actually extended after the Second World War both by the constitution and individual laws, are made such little use of is that they cost a lot of time and money and that public administration itself has been building up a complex system since the fifties which offers the public a service for out-of-court settlement of disputes.

The extremely vehement environmental conflicts in the sixties gave rise to the Basic Law on the Environment, of which Article 21 laid the foundation for special legislation to define out-of-court procedures. In this the government is assigned the task of establishing procedures for settling environmental disputes in the form of mediation, conciliation and arbitration which also include the possibility of financial compensation. This was put into practice in the form of the "Law on Settlement of Disputes in Connection with Environmental Damage" of 1970 and the "Law on the Establishment of a Committee to Settle Matters of Environmental Damage" of 1972.

Three separate institutions were set up to deal with out-of-court settlement of environmental conflicts:

- *Complaints commissions* at local authority level whose function in many respects corresponds to that of an ombudsman.
- *Prefecture commissions* to settle disputes over environmental damage deal mainly with disputes between private individuals and between private individuals and the administration. The members of the commission are independent. Depending on the case concerned they carry out mediation, arbitration or conciliation procedures.
- *The central commission* for dealing with environmental damages is an independent government office reporting directly to the Prime Minister's Office. It has a semi-court function. It can also carry out mediation, arbitration or conciliation procedures and in addition it is the only institution which can carry out what are known as "verdict procedures" to determine liability or cause.

Essentially there are four different procedures for settling disputes:

- Mediation
- Conciliation
- Arbitration
- Verdict on guilt/liability and cause

In the case of mediation the role of the commission is primarily to act as go-between for the parties in dispute until they can find a mutual basis for agreement. The result is recorded in a memorandum. Mediation is the procedure for conciliatory settlement of disputes which is most deeply rooted in tradition. It is also widely used in civil and public law cases (cf. Sagami 1989). Apart from a few exceptions the costs of the procedure are borne by the parties involved; they are significantly lower than normal court procedures.

National statistics show that of the different procedures available mediation procedures are clearly favoured. On the whole the procedures for settlement of disputes (and the complaints system) are considered to have positive effects. They are seen as being relatively flexible and accessible to the public (cf. Upham 1987). The nature of the procedure means that the measures connected with it are related to the individual case and, as in the majority of cases it is not a question of implementing legal stipulations, the measures are flexible in that they not only take into account the local conditions and technical possibilities but also the economic situation of the source of complaint. It can generally be assumed that economically acceptable compromises will be found. It should be emphasised that due to the conciliatory dispute settlement systems the negotiating position of the parties involved is stronger, particularly in cases where a court case would be either difficult or impossible, since the legal barriers which would otherwise exist are to a great extent eliminated. The different procedures for settlement of disputes also provide the parties involved with the choice of yet another instrument for voicing their interests; the option of making recourse to other ways of implementing their interests still remains open.⁴

2.2.2 The Federal Republic of Germany

Mediation procedures are an extremely rare element in the environmental policy of the Federal Republic of Germany; other types of procedure are far more common. At present, in virtually all areas of the environment, pre-negotiation or alternative procedures take place prior to formal procedures and work on an extended definition of the term co-operation, taking into account the interests of the environment and the local people. Most of these cases are related to waste. To name just a few examples where new forms of conflict settlement are being tried out: the search for a site for a household

⁴ The significance of informal procedures for dispute settlement in the field of environmental policy, especially waste management, is currently being examined by Japanese experts in cooperation with the WZB mediation project which includes a comparative study of six countries.

waste landfill in the municipal district of Hildesheim and for a landfill for hazardous waste in the county of Arnsberg; risk assessment, safety measures, and clean-up of a populated contaminated area in the cities of Wuppertal, Essen and Hamburg; safety measures and clean-up at a landfill in the village of Vorketzin in Brandenburg, clean-up of a sludge landfill in the city of Bielefeld, modification of a waste incineration plant in Bielefeld-Herford, setting up of a traffic forum to work out a long-term traffic and transport concept for the city of Heidelberg, development of a hazardous waste plan for the federal state of Lower Saxony, setting up of a working group on waste management in the county of Osnabrück, planning process for a landfill for sludge dredged from the docks in Hamburg; clean-up measures for sources of pollution and installation of plant for environmental protection in companies (Hamburg, the village of Seelze), examination of the impact on the environment of producing a pesticide at the Hoechst company and a dialogue (co-ordinated by the Science Center Berlin: WZB) to assess the consequences of cultivated crops which have an in-built resistance to herbicides induced by genetic engineering (cf. van den Daele 1992).

In the cases mentioned, which take place in the context of regional planning, environmental impact studies, official approval of plans, licensing procedures and other formal procedures, discussions take place in small working groups, and moderators, people specially appointed or consultants are given the task of providing information and creating a compromise within the group. In the Federal Republic of Germany there are, at present, only two real mediation procedures which measure up to the standard developed in the U.S.A., that is to say which deal with cases of conflict which can be classed as major both in terms of political-social importance and the project at stake and which involve an independent mediator. One is the mediation procedure in the village of Münchenhagen in Lower Saxony and the other in the district (Kreis) of Neuss in North Rhine-Westphalia. Both are to do with questions of waste management.

2.2.2.1 Mediation procedure on the waste landfill in Münchenhagen

The background to the mediation procedure in Münchenhagen (Lower Saxony) was years of controversy over the Münchenhagen hazardous waste landfill which centred around suspicion of illegal depositing of waste, contamination of soil and water and health risks. In the course of events, which was rife with scandals, a court declared the landfill to be in contravention of the law, a special commission was set up in the criminal investigation department and a committee of investigation was also set up in the Parliament of the *Land* (state) of Lower Saxony. The parties in the dispute - representatives of the *Land*, various town councils, local authorities and county authorities and several pressure groups - were deeply split on the issue. In this situation Meinfried Striegnitz, a member of the Luccum Evangelical Academy, situated near the landfill, became involved. He organised and chaired a number of discussions with experts which nearly all the parties took part in. This essentially positive experience led to the idea of setting up a broader-based mediation procedure. The idea became reality when the Münchenhagen Commission was established at the end of 1990 and Meinfried Striegnitz was appointed as official mediator by the Environment Minister of Lower Saxony.

The aim of the procedure is to get the disputing parties to agree on a clean-up method. The role of the mediator is primarily to sound out whether there is any scope for manoeuvre, identify conflicts early on, and maintain an uninterrupted dialogue. If controversial issues cannot be settled under the guidance of the mediator the parties to the conflict, before instigating a court case, have the possibility of calling upon an independent arbitrator. To date this has not been necessary.

The mediation procedure has not yet been concluded; the experience up till now has, however, - particularly in view of its pioneering function - been very promising. For example, the procedure has managed to get the parties which were previously in conflict to work together in a constructive, objective manner. Prejudices have been overcome and an open atmosphere for dialogue has been created which proved very fruitful for the development of trust. For some problems which had previously been the subject of great controversy it was possible to find solutions which all parties accepted. In particular it was possible to eliminate the lack of information which had been bemoaned previously. The initial results of a review of the mediation procedure have shown that virtually all parties involved evaluate the procedure positively. Those questioned stressed the positive function of the mediator in improving the general and particular communication between the parties in dispute and in furthering the process of problem-solving. Recently, in August 1992, an agreement was reached for the first time by all parties to the conflict on general clean-up objectives, safety measures and criteria for evaluating them (cf. Striegnitz 1990; Pfingsten 1992). The aim is to come to an agreement by the end of 1992 on an overall concept for the clean-up of the landfill.

The second major mediation procedure is going on in the district of Neuss and is concerned with the waste management plan for the district. Below is a detailed report on the procedure which has been the subject of a parallel academic investigation by a mediation project team (of which the author is co-director) within the WZB (Science Center Berlin).

2.2.2.2 *The mediation procedure on the waste management plan in the district of Neuss*

Since 1990, social scientists at the WZB have been carrying out a broadly based research project on mediation procedures in environmental policy using the problem of waste management as an example (cf. Fietkau/Weidner 1992). The central subject of investigation is a mediation procedure concerned with waste management programme of the district of Neuss (North Rhine-Westphalia). The mediation procedure was initiated and developed by the research team of the WZB in conjunction with the Department of Environment and Health of the district. In addition to this mediation procedure, which is at the centre of the analysis, experiences with other mediation procedures in Germany and abroad (Austria, Canada, Japan, Netherlands, Switzerland, U. S. A.) are evaluated.

At the centre of the project are the following questions to be researched:

- How do mediation procedures differ in political and sociological terms from other procedures for developing environmental standards/norms?
- Can mediation procedures be successfully used in the Federal Republic of Germany to solve environmental problems?
- How can they be integrated into the political, legal and administrative system of the Federal Republic of Germany?
- What elements in the mediation procedure, which can be identified and described in sociological terms, can be said to further or impede its success?
- How do the public and the institutions involved react to the procedure?

The examination of these research questions is being carried out in an inter-disciplinary manner and includes international experience and the experience of people involved in the practical work of the relevant fields (cf. Pfingsten/Fietkau 1992). In academic terms this research represents the exploration of virgin territory.

To date there are no results of evaluative research by social scientists in Germany on mediation procedures. Due to the differences in the legal framework and political tradition, the most advanced Anglo-American research can be transposed only to a limited extent to the German situation. Apart from that it also has shortcomings in that it primarily analyses mediation procedures in retrospect. We are hoping that a parallel research project, like the model project being carried out at present in Neuss by the WZB research team, will make it possible to produce results which are not filtered through the memories of those involved and which, due to the directness of the observations, do not have to be content with summarised versions which is necessarily the case when documents (minutes) are analysed. These analyses of procedure (based on video and tape recordings as well as written questionnaires for all mediation sessions), are currently being carried out. Since it is important not to interfere in the on-going process, it will not be possible to report comprehensively on the results until a later date.

In September 1991 the local council of the district of Neuss approved a waste management programme. It is intended to provide "reliable disposal" as required by law and to put into practice the priority given in principle to avoidance and recycling over "disposing" of waste. The remaining refuse is to be incinerated and the incineration residue deposited in a landfill. Various aspects of this programme were discussed by the local people, some of them were the subject of great controversy. The issues included:

- the full use of all possibilities for avoiding and reducing household
- waste and waste from trade and commerce;

- the use of appropriate methods for separate collection and sorting of recyclable waste fractions;
- the increase in the proportion of waste generated in the district which is recycled;
- the necessity and capacity of a waste incineration plant;
- the siting of new plants for sorting, recycling, composting, treatment, incineration and landfilling waste

The mediation team of the WZB, with the co-operation of the local authority, initiated a mediation procedure for the waste management programme and took over the task of finding a mediator. Professor Dr. Georges Fülgraff (formerly president of the Federal Health Agency, secretary of state in the Federal Ministry of Health and member of the expert committee advising the government on environmental issues) agreed to act as mediator. In the long and tedious search for a mediator we focused on the following criteria which we thought the post required: impartiality, competence in the subject matter and in dealing with people, experience in politics and overall reputation.

After a period of several months of communication between the WZB research team and all groups with potential interest in the case, there was extensive approval in the district both for the procedure itself and the choice of mediator. To support the on-site organisation of the procedure the WZB set up a mediation office in the district.

After lengthy negotiations and numerous bilateral and multilateral preliminary discussions between the mediator and potential participants in the procedure, the first communal mediation meeting took place in the town of Grevenbroich in March 1992. Over 60 people took part, representing some 30 organisations and institutions from the field of politics, the administration, nature conservation organisations, churches, pressure groups and industry. This meeting constituted the beginning of the mediation procedure. A second meeting in Neuss in May 1992 produced the first concrete results: a moratorium was agreed: no binding stipulations were to be made, particularly as a result of the action of the administration, until a series of expert reports were available which would enable the discussion to continue on a sound, objective basis. This includes the intention to have consultants trusted by the pressure groups comment on the existing waste management programme.

A short chronology of the mediation procedure in the county of Neuss

December 1990

The administrator in charge of the environment in the county of Neuss, Dr. Reiner Fonteyn, indicated that he is interested in carrying out a mediation procedure in conjunction with the WZB to deal with the waste problem in Neuss.

February 1991

The WZB research team and the local council discussed the mediation procedure and agreed on a joint launch of the project.

June 1991

We presented our mediation project at the public "waste forum" in Neuss and proposed

our candidate Professor G. Fülgraff as mediator. Both the project and the choice of mediator met with approval.

August 1991

The mediator took up his post.

September 1991

In September 1991 the Neuss county council passed a waste management programme. It is intended to provide "reliable disposal" as required by law and to put into practice the priority given in principle to avoidance and recycling over "disposing" of waste. The remaining refuse is to be incinerated and the incineration residue deposited in a landfill.

October 1991

A mediation office was set up in the county of Neuss.

13 November 1991

A co-operation agreement on the mediation procedure was signed by the responsible Neuss authority and the WZB research team.

November 1991 - January 1992

Preparatory discussions in advance of the first mediation meeting: A total of 21 preliminary discussions were organised by the mediator and the WZB mediation project team with all potential participants. In general there was approval for the procedure and willingness to participate.

28 March 1992

On 28 March 1992 the first joint mediation meeting took place in Grevenbroich. Over 60 people took part, representing some 30 organisations and institutions from the field of politics, the administration, nature conservation organisations, pressure groups, churches and industry. This meeting constituted the beginning of the mediation procedure.

The first concrete step was the announcement of the intention to have consultants trusted by the environmental pressure groups comment on the existing waste management programme. It was agreed that no further measures should be taken until the expert report had been completed and discussed.

8 May 1992

Individual questions concerning the expert report were discussed by the mediator and the environmental pressure groups. They developed a catalogue of questions. The consultants to prepare the report were selected.

26 May 1992

2nd large mediation meeting. The proposals of the administration on the appointment of consultants are discussed by the 40 participants. Agreement was reached.

3 July 1992

Meeting held between the district administration, the pressure groups and the consultants to discuss a report on environmental implications for the area. A report was commissioned to describe the effect on the environment and the three possible sites for the waste incineration plant currently under discussion.

10 July 1992

Meeting between the district administration, pressure groups and consultants to discuss a health study. A report was commissioned to describe the current state of health of the population at the three possible sites for the waste incineration plant.

18 December 1992

The third large mediation meeting will take place.

Below is a description of some of the experiences we gained during the preparation process for the procedure in Neuss.⁵

Determining the group of participants: at the beginning of the mediation procedure the question arises as to who should take part in the procedure and who should decide this. Should it be everyone affected, everyone interested or all those who can legally or politically intervene in the planning process? In preparing the Neuss mediation procedure we talked to public administrators at different levels, parties, pressure groups, trade unions, employers associations, companies and churches. We invited everyone we knew to be interested to the first meeting. Some 60 people from 30 organisations came. In such a large group it is very difficult to have a direct exchange of opinion. If everyone has something to say about a particular problem there will soon be a severe time problem. Spontaneity therefore has to be dampened by centralised running of the meeting. We suspect that as the mediation procedure continues there will be a reduction in the number of participants. The opportunities for discussion can, however, be ensured by holding meetings in small groups in addition to the large mediation meetings in order to deal with individual points on behalf of and in preparation for the mediation meeting.

Equal treatment: equal treatment of everyone involved in the mediation procedure is one of the basic conditions for mediation. This approach, however, is incompatible with political and legal reality. The county administration (Kreis Neuss) as planning authority responsible for the waste management programme and the president of the regional government (Regierungspräsident) as licensing authority have by virtue of these functions special roles (*primus inter pares*). This has consequences for the legal design of a mediation procedure (cf. Holznagel 1990) and also causes problems in the social and political preparation and implementation of the mediation procedure.

Since the county administration drew up the waste management programme and organised the political decision-making process connected with it, it automatically had an ambivalent attitude to the mediation procedure. On the one hand the mediation procedure could disturb the overall progress and yet on the other hand it is seen as providing an opportunity to deal with conflicts in a well-ordered and efficient manner. The

5 These experiences are specific to this procedure with all the features specific to this district, both in terms of the case in hand and the political situation. They are also specific to what is certainly an atypical situation, i.e., that this procedure is partly being financed by federal research funds (Federal Ministry for Research and Technology) and that it was initiated by a research institution.

The following comments on the results have been prepared by my colleague, Hans-Joachim Fietkau (co-director of the mediation research project).

administration naturally has an interest in having its ideas accepted in the mediation procedure. It thus at one and the same time represents the interests of and administers the political process. As main participant it also becomes one of the main partners for dialogue in the preparation of the mediation procedure. The close involvement of the administration in the mediation procedure arouses the suspicion of the other participants that mediation could simply be an instrument to help the administration enforce its will. This is certainly true to some extent and yet in this the administration does not differ from the other participants. Nevertheless, this constellation does confront the mediator with the problem of having to work closely with the administration, because otherwise a mediation procedure would hardly be possible, whilst at the same time not allowing himself to become involved in the interests of the administration and, what is more, making this clear to the outside world. Credibility for the impartiality of the mediator was considerably facilitated by the fact that his work, his office in Neuss and certain other things were financed by the WZB which receives funding for the mediation project from the Ministry of Research and Technology. Nevertheless, the pressure groups and representatives of the Green Party were sceptical at the beginning as to whether the mediator and the WZB did not have undeclared interests behind the veil of impartiality being presented to the public. This suspicion made them sensitive to individual actions taken by the mediator and the WZB. We believe, however, that the distrust disappeared over the course of the procedure.

Parallel research: one peculiarity of the Neuss procedure was the parallel academic research which went with it and, hand in hand with this, the fact that it was initiated and financed by a research body. This prevented a "normal" consultant/commissioning office relationship between the mediator and the county administration. This has the advantage of making it easier for the mediator to implement and display his impartiality. However, it also has a disadvantage in that the impression could be gained that the mediator had not been appointed but had imposed himself on the procedure. The "normal" aim of a mediator of earning money through his work has been overlaid by the seemingly diffuse research interest. The personal interest of the mediator and the WZB make it seem that both these parties are difficult to keep a check on - going as far as producing uncertainty as to what will be written in the academic documentation about those involved and if this could not prove disadvantageous to them.

Conditions for initiating a mediation procedure

On the basis of the experience of initiating a mediation procedure in Neuss as well as the experiences of others working in this field, a number of conditions (which make no claim to being exhaustive or systematic) can be named which are important when launching a mediation procedure:

- All concerned, or at any rate the central participants, should have the expectation that negotiations will swing the outcome of the problem-solving mission in their favour and/or that the problem-solving process itself will be more advantageous to them than a conventional (legal) procedure.

- All potential participants must be prepared for the procedure. A minimum of consensus must be achieved in which the parties agree on forms of dealing with each other.
- For the preparatory work a person must be appointed to whom all participants can voice their opinions and who enjoys the trust of all parties. To ensure communication amongst the participants and to deal with organisational matters and the problem in hand the mediator must set up an office "on the spot".
- A basic outline of the problem must be presented, whereby it must be ensured that the position of all the participants remains flexible.
- The groups and institutions involved must appoint individuals to represent their interests (if possible with continuity) throughout the procedure.
- It is important to clarify the cost aspect of the procedure. The type of financing must avoid inherently favouring any particular solution and any doubts in this direction must be eliminated.
- The relationship between the mediation procedure and the legally prescribed procedure for the case in hand must be clarified as far as possible.
- Relationships with the press and the public for the duration of the procedure must be clarified.
- The potential participants in the procedure must agree in advance on a mediator to run the actual procedure.

The first results from our analyses of the mediation process are now available - the mediation meetings are recorded on video and audio tape and a set of questionnaires is circulated to all participants on the day of each meeting. Several series of interviews with selected "mother organisations" of the participants will be conducted. In addition, the documents of the formal proceedings are analysed. During the preparatory phase a trained psychologist recorded and analysed almost all meetings the mediator had with potential participants. For practical reasons and reasons of methodology it is not possible to publish these results in detail whilst the procedure is still running. This would be an intervention on the part of the observing scientist and could interfere in the dynamics of the procedure. The results listed below have thus been generalised; they are based on evaluations of the questionnaire which was distributed at the second mediation meeting⁶:

- Most of the participants in the procedure have no previous experience with mediation or similar procedures. This is unfamiliar ground for them.

⁶ The evaluation was carried out by my colleague, Karin Pfingsten (WZB).

- The participants have a very positive opinion of the mediator. He is virtually unanimously perceived as being competent, fair and sure of his work.
- Almost half the participants consider a solution approved of by all parties to be feasible. The other participants are either uncertain or sceptical about this.
- Approximately one third of the participants said that the joint mediation meeting had changed their view of the problem and/or the other parties to the procedure.
- Approximately half of the participants believe that the proposed waste management plan could have negative effects. Possible risks are perceived to be health problems for local people, the political climate, the ecological situation and the quality of life in the county.
- The majority thought that the waste management plan would boost the economy of the county but would not be so useful to other areas of life (health, ecology, politics, quality of life).
- Almost half of those involved in the procedure believe there are alternatives which would make it possible to realise the economic benefit of the waste management plan in a different way.
- When asked to place the aims of the procedure in order of importance, the average list of priorities was as follows:
 1. a solution which would last
 2. a fair solution
 3. an unequivocal result
 4. a solution approved by the general public
 5. a solution which can be easily implemented
 6. a rapid solution.

To conclude:

To date there has been little experience with mediation procedures in the field of environmental policy in the Federal Republic of Germany. It is nevertheless possible to make use of the foreign concepts, particularly those developed in the United States, Japan and Canada.

Mediation procedures are the subject of increased attention by academics. Particularly jurists have begun to analyse and try to develop standards for this procedure. In the meantime social scientists are also focusing more attention on the mediation procedure. The academic observations made in the Federal Republic of Germany are, however, often of a purely speculative nature; it is obvious that they lack concrete experience. Whether and how it will be possible to successfully carry out mediation procedures within the legal framework and political tradition in the Federal Republic of Germany is still an open question. To answer it empirical hard labour is required; the institutional and theoretical "superstructure" can then be built up.

3. Mediation as a policy instrument

As I have described in the previous chapter, in some countries (U.S.A., Japan, Canada) mediation is already common practice in the environmental arena. In other countries it is still something of an exception but is being increasingly used.

To my knowledge, mediation in the field of environmental policy was a "social invention". It was not incorporated into the arsenal of environmental policy instruments as a compulsory or optional standard procedure but owes its existence to the initiative of some social groups. In the meantime (particularly in Japan and the U.S.A.) mediation has also become a formal governmental instrument and has to varying degrees been standardised. In individual cases the law requires that it be used before recourse is made to other procedures for dispute resolution and decision-making (U.S.A.). However, not even this has made it an exclusively governmental instrument. Governmentally unregulated mediation procedures still take place when social groups take the independent decision to try out this instrument.

Can a "hybrid" of this kind be counted as an environmental policy instrument? My answer is yes, for reasons I shall set out below. This explanation is not intended to be a further contribution to the discussion on classification of environmental policy instruments. That is an admirable exercise which is proving to be infinite and which many social science students have devoted time to.

Classifications in political analysis should not be an end in themselves (cf. Mayntz 1980, 1983; Kaufmann/Rosewitz 1983). For political analyses they can be very helpful, since questions, hypotheses and theorems which have already been developed for and possibly empirically tested on existing classes/types can be applied to new instruments which have still to be researched - such as mediation. This facilitates the design of theory-driven empirical studies.

First, I shall reiterate briefly what is meant by mediation. To do this I shall use definitions developed in the U.S.A. because the mediation procedure has been given most careful consideration there by social scientists (including economists and legal experts).

Gerald W. Cormick (1980) 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 characterised 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 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 order" 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 co-equals; 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 superhuman qualities and skills in order to be able to fulfil the role assigned to him 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 U.S.A. institutions grew up in the seventies which run systematic training schemes.⁷

I shall not go in detail into the methodological and practical aspects of designing and implementing mediation procedures nor into the skills of the mediator. The following brief list of criteria is intended to give a general idea:

- Since participation in mediation procedures is essentially voluntary, the mediator, unless he has been called in by one of the parties to the conflict into a set-up they themselves have created, must in advance inform and persuade potential participants (Gross 1972: 269).⁸
- The exploration of the issues is carried out jointly by the participating parties being supported by the mediator.
- The mediator has no authority to impose a settlement on the participants.
- The mediator facilitates the negotiation process by assisting the parties in reaching a resolution acceptable to them.
- The mediator shares the responsibility for ensuring that any agreement reached represents a workable (feasible) solution. This means that he has an advisory function for participants who have little or no knowledge and practical experience of the issue at hand (particularly highly complicated ones).

⁷ Cf. the institutions listed in the newsletter CONSENSUS, published by the Public Disputes Network, Cambridge, MA.

⁸ This task goes beyond what is normally thought of as "persuasion" in that the mediator is required to state very clearly the advantages and disadvantages of taking part or not taking part. Compare this to the following definition: "Persuasion takes place when A influences B to adopt a course of action without A's promising or threatening any reward or punishment. It may take the form of example, expectation, proposals, information, education, or propaganda" (Gross 1972: 269).

So, is mediation, as defined above, a policy instrument and if it is to what existing categories can it be assigned?

Unlike the relatively recent mediation procedure the term policy instrument, well established in political science, has no precise definition. It is a frequently used yet extraordinarily diffuse term. Many political science dictionaries do not even list it separately (nor the term instrument) although they often bandy the word around in other listings (such as programme, implementation, decision-making, policy analysis) or use other words to circumscribe it (e.g. political means, methods, devices). It is therefore no wonder that elements of politics which are otherwise very distinct from one another are sometimes referred to as instruments: for instance, some refer to a political programme as an instrument, whilst others would only call the elements or certain elements of a programme instruments.

In German the semantic situation is even more hair-raising than in English, since the German word *Politik* carries the meanings polity - politics - policy - and it is impossible to make a linguistic distinction. German political scientists have started to try to be more precise by circumscribing it and using political structures/institutions for polity, political process for politics, and political substance/political field of action for policy. Policy thus includes the substantial and procedural aspects of political programmes designed to give shape to social relationships; this area includes what is seen as the state's responsibilities for dealing with problems and the strategies and instruments used for this purpose.

In everyday usage *instruments* are appliances and tools (Latin: *instrumentum* - equipment), i.e. means which are used to carry out a particular task. It would thus seem logical to place them in an aims/means context which is what policy researchers do, in that they define political instruments - i.e. instruments to achieve a purpose or goal - which are needed for political action (to be more precise are used by the representatives of the system of government) as an important element in policy programmes, whereby the programme can be an analytical construction (ideal programme) of the policy researcher or an real programme.

Policy analysts see policies or *policy programmes* as a phase in the political process (policy-making, policy cycle), which according to Wildavsky, for example, contains the following elements: perception and selection of problems, articulation and definition of problems, formulation/design of programmes, conclusions/decision-making, implementation, feedback, evaluation of the effects of the programme, termination of policy-making.

Literature on the subject has no uniform definition for the term *programme* nor is a clear distinction always made between programmes, policies and instruments. A proposal influenced by implementation research for which there is a broad consensus, at least in the Federal Republic of Germany (Kaufmann/Rosewitz 1983: 34 ff.), uses the term "policy" for a perceived group of connected political measures which refer to a particular area of politics, i.e. an institutionalised sector of state policy-making, for

example economic policy, financial policy, research policy, social policy.

The term programme, which is usually used in the U.S.A. to designate practical political initiatives, refers to the output from the programme design process and thus the input into the implementation process. A programme as a rule contains a number of inter-related decisions to enable a programme objective to be attained. Ideally it contains the following elements: the problems selected for treatment, the objectives the programme aims to achieve, assumptions about intended effects, and details of the institutions entrusted with carrying out the programme (cf. W. Jann 1981: 49). The policy instruments are as a rule also part of the implementation part of the programme; they serve to implement and enforce the programme objectives.

The instruments chosen (and correspondingly the programmes to which they belong) can be classified into specific types (cf. Kaufmann/Rosewitz 1983; Howlett 1991). For example, it is common to differentiate between hierarchical and authoritarian instruments (such as decrees and bans) and information and persuasion-oriented instruments, financial and procedural instruments. A procedural instrument (or procedural control) serves to create negotiating systems or to institutionalise rules which are intended to reconcile the interests of all parties affected by programmes.

In reality there are often combinations of different instruments within one programme. Policy instruments are means of (direct and indirect) political control to fulfil public responsibilities. As such they are also closely connected to the broad discussion on the capacities, capabilities, wills and skills of the governmental system to control other (social, economic etc.) systems.

Howlett (1991:2) provides the following comprehensive definition:

"Policy instruments" is the generic term provided to encompass the myriad of techniques at the disposal of governments to implement their public policy objectives. Sometimes referred to as 'governing instruments' or 'tools of government', these techniques range in complexity and age, although most are well known to students and practitioners of public administration."⁹

Dahl and Lindblom had argued as early as 1953 that the number of alternative policy instruments was virtually infinite. They therefore drew up a classification based on the idea that most policy instruments lay between the poles of five different continua of government choice. In the first continuum, for example, the instruments are classified according to the degree of involvement of private and public companies/institutions. The following table provides an overview.

9 According to C.W. Anderson, quoted by Howlett (1991: 2), for the theorist of policy instruments, "politics is always a matter of making choices from the possibilities offered by a given historical situation and cultural context. From this vantage point, the institutions and procedures of the state to shape the course of economy and society become the equipment provided by a society to its leaders for the solution of public problems. They are the tools of the trade of statecraft."

Table:	Dahl and Lindblom's Continua of Instrument Choice
Continuum 1.	Nature of Instrument Ownership: Government to Private <i>Government→Part Government→Joint Govt-Private→Private</i>
Continuum 2.	Nature of Government Influence: Compulsion to Persuasion <i>Compulsion→Arbitration→Mediation→Conciliation→Information</i>
Continuum 3.	Nature of Government Control: Direct to Indirect <i>Nationalisation→Licensing→Taxes/Subsidies→Macro-manipulation</i>
Continuum 4.	Nature of Instrument Membership: Voluntary to Compulsory <i>Private Clubs→Compulsory Membership Organisations→Nation-State</i>
Continuum 5.	Nature of Instrument Autonomy: Full to None <i>Autonomous Agencies→Semi-Autonomous Agencies→Bureaucratic Agencies</i>

Quoted from Howlett 1991: 6

The table above shows clearly that mediation is seen to be a policy instrument and is assigned a position midway between "compulsion" and "persuasion."¹⁰

Now that I have quoted political science literature to prove that mediation is a policy instrument, I can characterise environmental policy instruments as means used or legitimated by representatives of the government system for transforming environmental policy programme aims into environmentally-conscious behaviour. A central aspect of this is that the instruments for attaining goals must involve (e.g. initiating, influencing, stopping) human behaviour; this requirement distinguishes policy from e.g. technology. Goals without means/instruments are merely a statement of intention.

Mediation procedures can be considered to be environmental policy instruments since they are used or offered by representatives of the governmental system or because the representatives of public institutions participate in them. This is the case in virtually all major mediation procedures on environmental issues. According to this definition it is irrelevant to the classification of an instrument as a policy instrument whether it was initiated by the state, such as the classic "command and order instruments". Moreover, as I have already pointed out, mediation procedures are considered in some countries to be "state approved" instruments, in some cases they have explicitly been incorporated into environmental programmes.

¹⁰ Dahl and Lindblom (1963: 11-13; 1st edition 1953) place mediation between compulsion and information. The instrument choice that is closest to information is described as "informal advice from and consultation with government officials" (p. 12, diagram 2).

In the context of the most common classifications of policy instruments, mediation can be said to be a policy instrument which has a great deal in common with persuasion and procedural control if the criterion is the medium of control in which the instruments are embedded (authority, persuasion, coercion, incentives). It also belongs to the *negotiation* category.

One of the purposes of categorising and classifying policy instruments is that it helps to understand the factors influencing the choice of policy instruments and to forecast operation and effects. For the field of environmental policy in industrialised countries the accepted academic wisdom is that conventional, especially coercive, instruments often meet with fierce resistance from the affected parties, bring about undesirable side effects and are less than optimal from the point of view of efficiency and effectiveness. This seems to be the main reason why environmental policy researchers show strong preferences for indirect control instruments which leave the parties concerned a greater degree of flexibility in how they adapt to circumstances. This perception in environmental policy studies corresponds to the general opinion of German political scientists working on state control (cf. Scharpf 1992; Böhret 1992; Jänicke 1986).

Modern research into policy studies and state theory does not reject conventional instruments - they have proved very successful in certain areas of environmental policy in the Federal Republic of Germany, for example, as well as in other countries: the act on unleaded petrol, regulation on industrial furnaces and regulation on exhaust emissions from motor cars, to mention just a few cases.¹¹ It does, however, believe that under the democratic, pluralistic circumstances of complex industrialised societies "softer" forms of control, which are mostly based on negotiation, are more appropriate for managing problems which affect the whole of society, which need cooperation (or obedience) of sub-systems, and which cannot be solved through "the evolution of society" nor by unleashing market forces. Current opinion in German political science, which has taken notice of theoretical developments in the U.S.A. and Great Britain, considers 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.¹² The barriers to greater use of policy instruments based on these central forms are tremendously high in Germany, as will be shown in the following chapter.

4. Ideological and practical obstacles to flexible, negotiation-based policy instruments in Germany

The systematic abuse of non-renewable natural resources, a perceptible rise in environmental pollution, signs of an imminent global environmental disaster, militant tendencies within the environment movement, a growing potential for ecological protest

¹¹ An international conference in January 1993 in the WZB organised by M. Jänicke and H. Weidner analysed "successful examples of environmental policy". The results will be published in early 1994.

¹² Comments on this in H. Weidner, *Basiselemente einer erfolgreichen Umweltpolitik*, Ms., Berlin: WZB 1992 (forthcoming). Also includes numerous cross-references to further reading.

and successful blocking of public and private projects have, particularly in the Federal Republic of Germany, revived the discussion on the question of whether in advanced industrialised societies the state is at all capable of taking appropriate action to counteract trends which are causing damage to the environment. The papers given at the plenary session of the 18th Congress of the German Association of Political Scientists in 1991 were concerned with the question "To what extent is the state at the end of the 20th century able to act" and within this discussion the subject of the environment occupied a prominent position (cf. Böhret 1992). Essentially the outcome was the diagnosis that there had been an extensive failure on the part of the state which was still labouring under the illusion of being responsible for everything and exerting outdated forms of control. The therapy suggested was that the inadequate, hierarchical, "imperative" forms of control should be replaced by negotiation and mediation procedures.

"New instruments which are flexible and promote co-operation and consensus are what the state needs" was the general tone to be heard throughout the debate on general political theory, which was stimulated by a good deal of input from environmental policy research. To date there has been no response from the state environmental policy-makers: officially, at least, they are still clinging to their established set of dogmas. However, for some time now the increase in unproductive conflicts has increased the willingness to experiment with new methods where negotiations take place on a partner-to-partner level.

There is nothing in Germany's programme on environmental policy to prevent the use of co-operative forms of dealing with conflict. On the contrary: in addition to the polluter-pays-principle and the principle of prevention rather than cure, the principle of co-operation is expressly mentioned as a guideline for the stance to be taken by government offices. However, since it is churned out with boring regularity in official speeches on environmental policy, its essentially progressive spirit is hardly noticed anymore. Formulating the trio of principles in the opposite sense to that intended serves as a reminder of their high intentions: to be avoided are subsequent clean-up, nuisance to those not involved or even to those affected and a conflictual stance of the various agents involved. The things described in the programme as undesirable are nearer to the reality of environmental policy than those listed as desirable (cf. Weidner 1991).

A more widespread use of solution-seeking through negotiation is thwarted by the problem that in traditional German state theory the idea of a hierarchical relationship between state and society is dominant, the logical consequence of which is that the state is seen as being responsible for virtually all areas of society and as being at the head of the hierarchy. Official environmental policy has essentially followed this state-centered philosophy. In all major (and many minor) areas of environmental protection, state institutions have taken extensive design and control responsibilities (and with them the obligation to draw up regulations) upon themselves. In the field of waste management, which is particularly fraught with conflict, legislators have even - without pressure to do so - decided in favour of a state monopoly on disposal (and there-

fore virtually a ban on private disposal), which in effect means that the public sector has taken charge of setting up structures to ensure reliable disposal (cf. Höpfe/Beckmann 1990: 17)

The very lively and pluralistic debate on political and state theory, which has been going on for several years and which strongly recommends participatory, non-hierarchical procedures for creating consensus and facilitating decision-making, (cf. Scharpf 1992; Willke 1991), has had no perceptible influence; environmental regulations still positively exude the spirit of authority and a hierarchical interpretation of the role of the state, which critical observers see as a reflection of "omnipotence fantasies". Correspondingly, conventional environmental regulations still make up the majority of the state's range of standards - a trend which is virtually unaffected by changes of government or statements to the contrary on policy or programmes (cf. Weidner 1991). Both political scientists and environmental economists alike have not minced words in criticising this. The president of the *Institut für Weltwirtschaft* in Kiel, Professor H. Siebert, complains of a "lack of courage to use the instruments of strict market economics in environmental policy" (Siebert 1989). In a report for the Ministry of the Environment, the economists K.-H. Hansmeyer (for many years president of the expert committee which advises the government on environmental questions - *Sachverständigenrat für Umweltfragen*) and H.K. Schneider complained of the shrinking scope available for flexible environmental policy instruments, a fact which they attribute to the fact that politicians and civil servants believe that the answer to all environment problems lies solely in perfecting their range of regulations. (Hansmeyer/Schneider 1990) The jurist E.H. Ritter describes the same state of affairs in even more drastic terms saying it as about as progressive and democratic as a Prussian army general and claiming that it has reached its limits (Ritter 1987: 937).

The way the state of the environment is developing would indeed justify such harsh judgements since, although Germany has seen two decades of systematic environmental policy-making (based on carefully worked out legal and institutional instruments), the results as whole can only be deemed modest, despite undisputed success in some individual areas (cf. Umweltbundesamt 1992). As a result the imminent environmental catastrophes, and linked to them the threat of political crises, are by no means simply the nightmare visions of a handful of people who make a living out of prophesying ecological apocalypses and whose world clock has always pointed to the thirteenth hour. Attention is now being drawn to dangers of this kind in scientific and technical reports prepared by state expert commissions which are otherwise cautious in tone (Deutscher Bundestag 1990).

Awareness of an impending crisis has generally speaking been made more acute by the realisation that society is causing irreversible processes of destruction in nature which in turn have a ruinous effect on society. It is the possible ecological self-endangerment of the whole of mankind and not simply damage and hazardous developments in isolated areas of the environment that is the main cause for concern which urges counter-measures that will actually change basic structures and a greater willingness for innovation in the political and administrative system. Greater tasks normally de-

mand and justify a change of philosophy and the political courage to experiment with new approaches. The introduction of solutions centred on co-operative negotiation calls for these qualities; it goes far beyond routine changes in policy since, if carried out systematically, it starts to eat away at the idea of an omnipotent state (apparatus). According to Thomas Ellwein, one of the "elder statesmen" of political science in Germany, the main responsibility of the state at the close of the 20th century lies in "legitimizing new forms of co-operation between citizens and public authorities in cases where they exist and developing them in areas where they do not yet exist. This would give rise to a fundamental move away from the state model of the 19th century. This development has already been going on for quite some time. It is just that we have difficulties noticing it (Ellwein 1991: 13).

4.1 A hierarchical view of the state impedes innovative procedures in environmental policy

Every field of social sciences which has looked at environmental problems has shown a general preference for a fundamental re-shaping of the framework for environmental policy and the instruments for controlling it with a view to achieving greater flexibility, participation and decentralisation. In society itself, "New Social Movements", (cf. Roth/Rucht 1991) of which over the last two decades the environmental movement has had the most influence, have put forward demands for a restructuring of industrial societies to create ecologically-minded economic democracy and an increase in the rights of citizens groups to participate in decision making and have, at least in terms of election campaigns, (headword: green parties) successfully represented their interests in the public arena. The willingness of the public to accept effective measures to protect the environment and to participate in them has gradually increased over the years (cf. Dierkes/Fietkau 1988). At the central level of the political and administrative system, however, there has been relatively little happening. The machinery for churning out laws and regulations is working at full speed in order to gain legal control over inherited problems and the "newborn problems" but almost everything is still running on the same old lines as ever (cf. Weidner 1991).

Empirical political studies have also made a major contribution to demystifying the ideology of all-encompassing state responsibility since they were able to demonstrate that the capacity, and indeed capability, of state controls to solve environmental problems in modern pluralistic industrial societies has been overtaxed. In view of this the leading scholar of the theory of environmental politics in Germany, Professor M. Jänicke - the founder of the so-called Berlin School of Environmental Politics Analysis -, has claimed there is a structural failure on the part of the state in the field of environmental protection (Jänicke 1986). In any case the reality of environmental policy in the Federal Republic of Germany has not always followed the standard bearers of a hierarchical, authoritarian interpretation of the role of the state. From the early days of systematic state environmental policy and over the years to an increasing degree there have been informal and also formal decision-making processes both on the level of programme conception and execution in which state organs were involved in negotiations and concluding agreements "simply" as representatives of particular interests.

Their function often becomes that of state attorney, who legitimates the negotiated solutions of particular groups of societies, declaring them to be in the common interest (cf. Mayntz et al. 1978).

Although negotiated solutions as such are hardly a question of dispute any more in the implementation of state obligations, and thus also in the field of environmental protection, they nevertheless have a bad reputation in the Federal Republic of Germany. From the pluralist and neo-corporatist point of view they are considered to be appropriate means of bringing about socially acceptable solutions to problems in complex, modern democracies but "environmentally-minded critics" point out a built-in ecological blind spot in the pluralism model: interests which are shared by a large number of people (known as diffuse interests) are difficult to organise and therefore have little chance of success in a system organised on the basis of a pluralistic range of associations. Moreover, in neo-corporatistically structured negotiations environmental organisations are, as a rule, excluded (cf. Beck 1988).

In addition to this the negotiated solutions in German environmental policy *to date* are also criticised for taking place under the false appearance of being under authoritarian state control. This, say critics, means that the huge potential of negotiation to make a contribution to flexible, appropriate solutions to problems which could reduce conflict is not used to full capacity, is even given a negative bias, thus causing unnecessary discrimination against this very promising method (cf. Scharpf 1992 for a general discussion).

Environmental activists and organisations as a rule view negotiating processes as something of a "fiddle", a secret pact between those parties to whom economic considerations are more important than what is ecologically required and possible.

The criticism they express is not, as they are often accused of, a general suspicion with no real specific basis. There are good reasons for their criticism of the interpretation and implementation of the co-operation principle which favours "polluter interests." A good number of negotiated solutions which, for example, were worked out in the form of what are known as sectorial agreements (i.e. concerning a particular industry) do little more than set down on paper what is already common practice, were simply not adhered to, or granted the companies causing environmental pollution generous deadlines for changing their policy (resulting in contaminated sites that had been given advance approval). The agreements with the automobile industry on reducing exhaust fumes and with the packaging and asbestos industries are prime examples of this (cf. Wicke 1989: 233 ff.). Procedures which formally require public participation, especially those involving a large number of people and which are particularly rife with conflict, are generally perceived as "alibi procedures" in which the essentials have already been worked out between the government authorities and the representatives of the company concerned. Individuals and groups representing their own particular interests or the interests of the environment in general are on the whole excluded from the "preliminary negotiations" which normally take place before the formal procedure begins.

It is, therefore, no wonder that formal participation procedures, particularly those involving the general public in cases likely to cause a good deal of conflict (such as nuclear or conventional power stations, waste incineration plants, airports), are perceived as being a mere alibi, having nothing but a veneer of public participation and a preprogrammed outcome. It is thus completely logical that a broad range of formal and informal methods of protest are used and mobilisation of the law courts is seen as the most promising way of ensuring the public interest wins through. As far as implementation of legislation is concerned, both on a local and regional level, many people right across the political spectrum experienced in the period of controversial environmental policy in Germany what the government authority in question really thought of the co-operation principle (cf. Knoepfel/Weidner 1985).

At central government level, where laws, regulations and the most important environmental standards are decided upon, it was primarily the environmental organisations which had bad experiences with participation procedures and also realised that the representatives of the state in the numerous standards committees and other committees could often not compete with the expertise available to the companies affected by environmental legislation. The inclusion of neutral scientific advisors was evidently not always able to shift the imbalance in favour of the environment. The independent committee of advisors on environmental questions - *Sachverständigenrat für Umweltfragen* - pointed this out: "It is not always possible to decide on a scientific basis what the optimal state of a particular environmental aspect is. It is far more important that society and the parties to the conflict are willing to seek a consensus on the quality of the environment to be aimed for in each case and the standards which therefore have to be imposed in democratic, participatory, and if necessary conflictual procedures ... The committee believes that, for the sake of acceptance by all concerned, both the procedure under which environmental standards are drawn up and the evaluation philosophy they are based on should be made more transparent" (Der Rat von Sachverständigen für Umweltfragen 1987: 17).

It is the way people have experienced the various levels in the state hierarchy and the formal and informal procedures which has created a fundamental lack of trust in the professed desire of environmental policy-makers and administrators to act in the public interest; a mistrust which, in the meantime fed by developments in other fields of politics, has led to political parties and state organs suffering a general loss of credibility. It should be stressed in this context that the role of state representatives in negotiated solutions concerning the environment, which in my opinion has rightly been criticised, is not the result of the occupational hazard of wishing to manipulate at the cost of the interests of the environment but to a large degree the result of pressures caused by the very structures themselves to clothe what are actually very reasonable (and unavoidable) forms of behaviour in a disguise which is accepted in the conventional and normative philosophy towards the state and the legal system. In doing so they not only place themselves but also the procedures in an ambiguous light.

These institutional and normative starting conditions and the background of conflict and bad experience must be borne in mind when considering the chances of

success of a new approach to environmental policy in the Federal Republic of Germany based on negotiation, a system which to judge by the current discussion of political theory and, as I have tried to show in the preceding chapters, on the basis of experience in other countries, is thought to have great merits.

5. Conclusion

Right across the board in the field of political theory there is a consensus amongst the most important representatives of the various fundamental positions; they all agree that the need for control of society has risen drastically, that the forms of control prevalent in the past are proving to be seriously inadequate, that non-hierarchical control methods which set out general guidelines should be used more and that finally the state should be more reserved in its desire to exercise control but should nevertheless not entirely abandon its overall responsibility for shaping society. An objective need for state control is identified mainly because it is not thought possible that the problems of the environment be solved in a purely "evolutionary" manner nor simply by unleashing market forces (cf. Offe 1987). The lowest common denominator in the various estimations of the role and capacities of the state is the view that the state is in principle capable of exercising control, in the sense that it has the capacity for a conceptually orientated shaping of the social environment by its political institutions (Mayntz 1987) on the condition that "yesterday's" forms of control are replaced by modern ones. It is above all the "soft" forms of control which are classified as modern: context control, control by procedure and by provision of information, consensus and dialogue-style arrangements.

In view of the increase in environmental conflicts it is particularly the consensus and dialogue style procedures for creating a common will and taking decisions which of all the control forms mentioned are enjoying the greatest renaissance. They represent ways of supplementing or substituting authoritarian and hierarchical decisions by conflict management techniques (particularly those which take into account minorities or groups in a weak legal position) which to a large extent aim at dialogue-style procedures and negotiated solutions and are usually guaranteed by agreements or articles. They are the expression of a modified interpretation of the state, since the state control organs in relationship to other social systems now occupy only the role of "primus inter pares" and grant the agents concerned the possibility of finding a common goal.

All the control forms mentioned, which are not pure "types" but to a greater or lesser extent overlap and make cross reference to each other, do not entirely replace conventional, hierarchical state intervention; on the contrary, they are to some extent dependent upon this intervention in that, for example, types of procedure, general framework conditions or the right to participate are themselves the subject of legislation. They do, however, leave the "fine tuning" to social sub-systems. With regard to the discussion on environmental policy instruments (as well as on policy instruments in general) and the discussion amongst political scientists of state control instruments, it can be seen that mediation procedures have a great deal of common ground with the forms of control and instruments currently considered most suitable for dealing with

problems and conflicts in advanced industrial societies. The conclusion can therefore be drawn that theoretically mediation procedures have great advantages over conventional environmental policy instruments. My experience so far with our mediation project, as well as the experience of mediator-assisted negotiations in other countries, leads me to believe that this is true if some constraints are taken into account: they are on the one hand not appropriate for settling disputes based on fundamental conflicts of values; on the other hand it should be noted that the capacities of non-governmental environmental organisations and citizens' pressure groups can very easily be strained by such time consuming procedures. It is not merely the time invested and financial aspects which cause the strain but also the high psychological stress placed upon the representatives of these groups when they try to commit their constituencies to agreements reached in the mediation process. These procedures in the arena of environmental politics will thus probably be confined to local and regional conflicts which have a direct effect on the immediate environment of those involved and are therefore of manageable dimensions.

I believe that mediation procedures, or more generally speaking alternative dispute regulation procedures, are potentially a valuable addition to the existing range of instruments for settling environmental problems. It would be exaggerated to expect them to be a fail-safe solution in the world of environmental policy. There will probably never be a single "path to heaven" of this kind, a super-policy instrument, in the highly complex field of environmental policy. This can be seen in all the practical experience of all countries to date, particularly those using the economic incentive instruments which were favoured for a time. In the (humble) realisation that not the search for the most appropriate super instrument but the pragmatic development (in a process of trial-and-error) of a wide range of different instruments - which permit a flexible reaction to the similarly wide range of problems - is the most promising approach, students of environmental policies when critically evaluating mediation procedures and theoretically considering different environmental policy instruments should not let their evaluation criteria and expectations become unrealistically high. They should similarly not be led astray by uncritical advocates of mediation procedures, particularly those who have a vested interest in these procedures and paint all too rosy pictures of the capabilities of these procedures.

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