Mediation in Environmental Conflicts: The Belgian Methodology*

Catherine Zwetkoff**

Introduction

This paper is an analysis of the mediation program applied to environmental conflicts in Walloonia, the French-speaking part of Belgium. The work is part of a large research project analyzing the effectiveness and feasibility of alternative dispute resolution (ADR) procedures to solve environmental disputes.[1]

Mediation was chosen for two reasons. First, Belgium uses mediation in many areas such as patent conflicts, neighborhood nuisances, labor and family disputes. Mediation is thus the object of social constructions to which any actor may relate and which consequently frame opinions about effectiveness and acceptability. The concept definitely "rings a bell" for the lay person. Under these circumstances, the legitimacy and effectiveness of environmental mediation has an empirical reality stemming from the arguments that citizens develop on the basis of their experience in other fields.

Second, mediation is the only method of ADR that has actually been applied to environmental disputes in Walloonia. The mediation program was conceived as a set of values that are implemented by "rules" fixing the shape of the process. Espace Environment, a member of Inter Environment, a network of ecological associations, introduced mediation at the end of the 1980's. Both organizations are institutionalized actors in environmental policy-making. In the context

* I am grateful to Peter Allen, Catherine Fallon, Pierre Huppet and Tomke Lask for insightful comments during the preparation of this paper. I am much in debt to Peter Allen for reviewing the English version. Research described in this paper was supported by the E.U. under Contract ENV4-CT96-0270.

** Catherine Zwetkoff is a Professor of Political Science, Faculty of Law, University of Liege, Belgium. Her teaching and research interests are in public understanding and participation in science related decision-making, especially in the context of risk management policy. Email: *czwetkoff@ulg.ac.be*.

1 Symposium, *Practical Guide on Environmental Communication for Consumers, Enterprises and Public Authorities,* **Symposium on Entreprises-Riverains: the Path of Communication,** organized by Inter-Environmental Wallonie (1997).

of siting conflicts, Espace Environment and Inter-Environment speak with one voice in their public discourse about the positive contributions of mediation to environmental conflicts.[2] They also control the services of trained mediators.

The subsequent uniformity of the Belgian mediation program considerably reduces fieldwork for researchers. However, it seriously limits empirical investigation of the feasibility and effectiveness of alternative methods. Consequently, the performance of the program refers to the international experiences described in the literature. While the feasibility of the program in the Belgian/Walloon context is an open question, controversies reported in the literature provide some insight into the critical aspects of the Espace Environment model proposed. The analysis of preferences of citizens who use court litigation rather than mediation provide direct evidence of the social legitimacy and perceived effectiveness of mediation.

This paper is structured around two questions. First, are the Espace Environment guidelines of the mediation procedure consistent with the stated goals? Discussion of this question focuses on the internal validity of the public discourse. Second, since the feasibility of any procedure depends on the social legitimacy of its goals, rules and implementation, are the values underlying the mediation model shared by the stakeholders? Namely, how does mediation compare with conventional approaches in terms of social legitimacy and perceived effectiveness? Discussion of this issue deals with the external validity of the Espace Environment mediation model. Observation of the program was based on:

(a) focus groups;
(b) semi-structured interviews with actors who have experienced mediation in the context of siting conflicts;
(c) the analysis of opinions expressed during public meetings; and
(d) a content analysis of Espace Environment published documents.

The data were analysed with a theoretical grid derived from the sociology of translation in the context of the theory of actor-network.[3] This approach examines how durable agreements may be

2 *Id.*

reached by focusing on the relationships between parties and the irreversible translations on which networks are progressively built. Convergence is measured by noting the actor's level of alignment during translation, and the level of network coordination. A translation is irreversible when it is subsequently impossible to return to a point where it was only one amongst others, or when it determines subsequent translations.

Translation has four stages that may overlap or even reverse. The first stage is problematisation, which defines a series of actors and the obstacles which prevent them from attaining the goals imputed to them. The second stage is interessement, which refers to the exploration and definition of group boundaries and strategic alliances that are shaped and consolidated through processes of inclusion and exclusion. The third stage is enrollment, which occurs when a particular identity is adopted compatible with some actor's strategy. The fourth stage is mobilisation, which refers to the process of representation. In mobilisation, the actors form a relationship with delegates so that only a few individuals are involved and actually appear in the public forum. The crux of this approach is to examine the ways that actors define their identities, possibilities of interaction, margins of maneuver and respective range of choices.

The Espace Environment Model of Mediation

Espace Environment publicly promotes a process that combines three functions present in an ordinary mediation. These functions are empowerment of the parties, recognition of the parties as stakeholders, and promotion of a fair solution. The mediator who facilitates communication and actively searches for a fair solution can achieve an balanced outcome through mediation if the parties are empowered and recognize each other. The Belgian program blends different forms and methods that determine the degree of activism of the mediator as well as the institutionalization of mediation.

---

3 Michel Callon, *Some Elements of a Sociology of Translation,* **Power, Action and Belief, A New Sociology of Knowledge?** 196 (1986); Michel Callon, *Techno-economic Networks and Irreversibility,* **A Sociology of Monsters: Essays on Power, the Technology and Domination** 132 (1991).

Espace Environment presents the mediator as more than a go between. It broadly outlines the mediator's role from its problematisation stage until the closure of the conflict. Since the parties engage in the process voluntarily and are free to exit at any time, the mediator's first task is to initiate an alliance between the actors/stakeholders who agree on a common definition of the problem. Next, the mediator must stabilize the alliance by involving the parties in either a learning process, using a problem solving approach, or a bargaining process leading to consensual settlement. At this stage, the mediator adopts the role of facilitator, acting on the relationships between parties by enhancing co-orientation, emphasizing similarities, and appealing for rational thinking rather than emotional discourse. The mediator also produces proposals that the parties may accept as common ground. There may be appeals to the ideology of community (group-bounded justice), to reconciliation, or the restoration of ongoing relationships. The problem is defined and redefined until a protocol, forged in the language of the mediator, is formed. The protocol will state, at best, or at worst, the points of agreement and disagreement. Once the parties sign the agreed protocol, their position becomes irreversible. Since mediation does not affect the legal procedure, public authority need not sign the protocol. The agreement does not engage the future of the local community or other groups.

Considering the crucial issue of its institutionalization, the promoters of mediation offer some rules guiding access to, and functioning of, the disputing forum. They dwell on the professionalism of the mediator, who is an expert in mediation and in the technical fields relevant to the dispute. They plead for more structure and certainty in the mediator's profile and in his or her relations with the population.

Discussion

The Internal Validity of the Public Discourse on Mediation

This discussion focuses on the internal consistency between three sets of institutionalized rules and their congruency with the mediation program goals. These sets were selected from amongst the many in the long history of mediation and its extension into most areas of litigation.

Qualitative data describing public discourse on mediation were tentatively interpreted using the analytical grid to identify possible critical rules in terms of internal consistency. Initial hypothetical interpretations were compared with the literature on mediation and litigation,[4] and focus group participants or informants made spontaneous comments.

Mediation operates by creating a network of actors/stakeholders who, at the end of a process of problem solving or bargaining, converge on a mutually acceptable position. The openness of mediation to all stakeholders is congenial to this procedure, but, when the conflict is complex, the network of stakeholders can become long and heterogeneous. Only a few stakeholders are actually involved in negotiation. To be successful, the mediator must make a conflicting forum converge onto a mutually acceptable solution. The convergence must ultimately be replicated on the whole network of stakeholders.

Mediation as a Voluntary Process Open to All Stakeholders

The Espace Environment mediation program is a voluntary process. Even the initial exposure to mediation is not mandatory, so that any concerned actor unwilling to use mediation gets de facto veto rights. Any actor is free to define him or herself as a stakeholder, a party, or spokesperson for a stakeholder. The openness of the process is a prerequisite for achieving its functions of empowerment, recognition and fairness. The mediation model contributes to a responsive justice when enhancing the congruence of stakeholders with spokespersons. Mediation opens the disputing forum to actors who may not have access to judicial litigation, therefore restoring their feelings of justice.

A critical examination of the public discourse and of empirical data suggests that the voluntariness of the process combined with its openness, while logically consistent, creates a paradoxical demand on the mediation and jeopardizes the whole process. In a voluntary process the diversity amongst actors is potentially greater. This increases the probability that some actor will refuse to recognize another as an obligatory passage point in the network being built through mediation. Without some pushing, many settlements could not be achieved.

4 *See generally*, Stephen G. Bullock & Linda Rose Gallagher, *Surveying the State of Mediative Art: A Guide to Institutionalized Mediation in Louisiana,* 57 **La. L. Rev.** 885 (1997).

Simultaneously there is pressure not to exceed some upper limit of acceptability for fear of destroying parties' trust in the mediator and confidence in self-determination. Espace Environment explicitly states that the mediator brings the actor into the story. To make this pressure acceptable, the public discourse justifies access to mediation by activating the rationale of expertise. Each spokesperson of one category of stakeholders is to speak in one area of competence. The public discourse explicitly inventories personal characteristics, expertise in mediation and in the technical field relevant to the specific conflict. The mediator speaks in the name of the quality of the process and the fairness of the solution to all, including the environment. Citizens are entitled to participate because they are experts in their own interests. Public officials, on their part, speak in the name of the collective interest. They also have to be enlightened on the individual interests so that the binding decision will be fair. Following the logic of Espace Environment, the openness of the forum is guaranteed by its expansion to three poles: the developer, the public authorities and the population.

The Mediator as Neutral and Moderately Proactive

The mediator modeled by Espace Environment is moderately active, being neither a mere go-between keeping lines of communication open, or a coercive authority applying pressure to achieve a "voluntary" agreement. Vested with the mission of defining stakeholders, of formulating suggestions and of pressing the parties to agree, the mediator affects the problematisation of the conflict in many ways. This yields another paradox since the mediator must be pro-active without including his or her own agenda.

Where a conflict brought before a third party transforms into a dispute, the sociology of translation highlights the process as yet another stage of interaction between the identity of the actors, their discourses, their interests and their margins for maneuver. Whatever the exact role, a third party transforms a private discourse into a public discourse by "rephrasing" the conflict. In doing so, that person activates interessement devices to shape or strengthen his or her identity and system of alliances. This is done by defining group boundaries and exploring strategic group alliances. Interessement devices are those processes of inclusion and exclusion that an actor can initiate to cut or

weaken the links between those defined as allies (but who may be tempted to construct their identity otherwise) and those who refuse to enter into a transaction.

Two interessement strategies commonly observed in siting disputes are the rephrasing of the problem by narrowing or expanding the discourse. Each strategy may rely on the use of a specialized or an everyday language to redefine the problem.[5] The consecutively modified relationships between the actors contributes or prevents their convergence on, a mutually acceptable definition of the problem and solution.

Narrowing, a process of exclusion, is performed by rephrasing the initially complex and highly subjective problem into one that is structured around an accepted and tangible "common denominator". A successful narrowing implies that the parties, and ultimately stakeholders, agree to use the pre-established categories that are suggested to circumscribe the framework of the dispute.[6] Expansion, in contrast, is when a party redefines the problem by including similar situations, facts, causal relations between facts and other situations that initially appears to be different or unrelated.[7]

The mediator also combines a strategy of expanding or narrowing to an everyday or specialized language. This raises two questions concerning the limits to the internal consistency of the mediation and its public acceptance. First, are any of the possible combinations of strategy and language more consistent with mediation than other procedures and, second, if so, what are the implications on the content and political relevance of the settlement and its irreversibility?

The most common scenario is that mediation starts after a conflict has begun. The mediator strives to reverse the problematisation initially operated by the parties and confirmed by their respective strategies of interessement. The aim is to get the network of parties, public authorities and audience (media), to converge on a new problematisation and finally on a local valid solution. This suggests that the rationale of mediation is more consistent with narrowing than

5 Lynn Mather & Barbara Yngevsson, *Language, Audience and The Transformation of Disputes*, 15 **L. & Soc'y. Rev.** 775 (1980-1981).

6 *Id.* at 778.

7 *Id.*

expanding. By reformulating a complex problem into one or several sub-issues, the third party shortens and homogenizes the network of stakeholders. An expansion strategy would complicate and globalize the problem. The networks would be longer and more heterogeneous. Such networks seem less likely to converge onto a common problematisation or to let locally valid rules of translation coordinate them.

Does the narrowing strategy lead to a solution that satisfies the preferences of all parties, and when the parties are unequal, is the mediator still in a position to help the less advantaged party get a transformative voice? In theory, the odds are against the least advantaged of the parties. Narrowing the scope offers no opportunity to re-problematise the conflict, making possible a new balance of forces and a new solution. Particularly when the parties are urged to use a bargaining approach, the mediator narrows the scope in accordance with the categories and interests of the parties who succeed in imposing its classification system on the others.[8] In contrast, the least advantaged individuals or groups use expansion. For example, it is the typical strategy of pro-environmental activists who challenge the established power structure to link a new definition to the interests of an extended moral community to which they feel responsible.

Turning to the language used, it appears that the openness of the mediation process advocated by promoters dictates the use of an everyday language. One may speculate on the validity of the claim that the use of an everyday language in mediation enhances the fairness of settlements between unequal parties. Both specialized and everyday discourses are two-sided. Advocates of mediation stress that where the language is specialized, access to the dispute may be restricted to those who are skilled in its use. In the worst case they will control the process. The rephrased dispute is no more responsive to the needs of the disadvantaged disputants. Where the discourse is general, the disputing process is more accessible to any party, including the least advantaged. In these circumstances, the re-problematisation is theoretically more responsive to the interests of parties, even when they are unequal.

However, an agreement closing a conflict formulated in a specialized language, for example, stipulating the rights and obligations

8 *Id.* at 783.

of parties in a formal way, might actually offer better protection to a party who is not familiar with its use. Vague everyday terms in an agreement hinder the monitoring of its implementation and evaluation of its outcomes by the disadvantaged party. The result may be cheaper rather than better justice.

With respect to the second question asked above, the essence of the mediated agreement is a locally valid negotiated solution only binding on the parties; relevant public authorities retain their legal control over the decision. Hence, implications for the political order may be limited. For example, mediation might be more consistent with a narrowing process that does not challenge the political order. More importantly, the outcome of a mediated case is valid only within the limits of the specific local context. The extent to which the solution will be applied to similar cases in the future, an estimate of its irreversibility, depends on circumstantial factors such as the likelihood that the same mediator will rely on his previous experience.

In contrast, reasoning on case-by-case differences and similarities is the essence of the decision-making process in the context of formal justice. This process contributes to the irreversibility of the decision in similar cases and hence perpetuates a social order (narrowing strategy) or changes the legal and political order (expansion strategy). Compared to the mediator, a trial judge whose decision challenges the conservative order is more likely to use a specialized language to enforce compliance with the decision. For this reason, pro-environmental activists who aim to change the legal and political order actually prefer court litigation to mediation. The former will reinforce any decision made in their favour.

Physical Separation of the Audience from the Disputing Forum and the Rule of Confidentiality of the Discussions

Compared with neighbourhood or family disputes, the disputing arena of most environmental conflicts is organizationally too complex to reflect the mediation model's tripartite dispute form. Given the great number and the heterogeneity of stakeholders, the parties in the disputing forum are selected for the sake of effectiveness and confidentiality in the discussions.

After the selection, the forum is physically separated from the stakeholders who then become the mandates of their delegates.

Negotiations are directly shaped by the transactions between the parties and the mediator, and indirectly by the stakeholders, assuming that the latter's expectations remain an integral part of the situation. The physical separation of the disputing forum, combined with the confidential discussions, moves the forum from a public to a private sphere.

In a public dispute, one or more parties may attempt to mobilise public support by expressing indignation over private values, known to be shared by the public, which are claimed to have been transgressed. Simultaneously such a party attempts to impose itself as legitimate defendant of those values.[9] Because values are not negotiable the displacement to the public sphere tends to enhance a fundamentally destructive rhetoric.

There are two aspects to the displacement of grievances to a private sphere. Combined with confidentiality it promotes a more rational discourse, insofar as the parties are no longer under the scrutiny of their supporters and the audience. This may decrease the intensity of the dispute. While this is a valuable step, it also carries a risk. Whenever a mediation case becomes lengthy, over months or years, the confidentiality and physical separation raise a key issue: will the spokespersons still be representative at the end of the process? Delegates to a private forum stretching over time are often viewed as complacent or as compromised with the developer or public authorities. Mandates do not always correlate with a compromising spokesperson's negotiated protocol. To safeguard against the progressive estrangement of the mandates and their spokespersons, it may be valuable to inject a structured and iterative two-way communication process between the parties and the stakeholders.

The External Validity of the Public Discourse on Mediation

Unlike other area of litigation in Belgium, mediation in environmental conflict management is in its infancy. Recent expansion of mediation suggests that the political culture is ready to consent and cooperate with what until now only characterized the management of social and political conflicts. Thus reluctance to use environmental mediation seems unlikely to be due to a negative cultural bias.

9 Nathalie Heinich, **Buren's Coloums at the Royal-Palac, Paris: Ethnography of an Affair** (4th ed. 1995).

Would more information on environmental mediation prompt citizens to prefer mediation over litigation? Case studies and the literature suggest that it is not all that simple. Another explanation might be that some view significant aspects of the actual design of the mediation program inappropriate to environmental conflicts. In what direction should policy makers look to fine-tune a methodology they wish to expand as an alternative to court litigation? Any prognosis of the feasibility of environmental mediation entails an analysis of the external validity of the public discourse on mediation.

Involved citizens consistently frame reactions to a siting proposal as a possible departure from justice and prefer litigation rather than mediation. Previous studies show that, during siting conflict, opponents consistently activated justice discourse.[10] A siting conflict framed in terms of justice becomes a dispute over the procedural and distributive fairness of the proposed siting. Typically parties have different meaning as to the fairness of the proposed siting.

Analysis of the discourses in a siting conflict illustrates how the use of different criteria in a judgement contributes to the object of the conflict. These criteria are the terms of the justice formula expressed by Lane.[11] Several categories of criteria may coexist. At most general level, the meaning of justice varies on three dimensions. First, individuals/groups can differ in terms of the weight they assign to justice criteria. Some focus on the source of injustice while others are more sensitive to the distributive outcomes or to the procedure of the allotment. Second, the meaning given to each of the relevant criteria may vary. Distributive outcomes can be evaluated in terms of different values or rules of justice such as equality, equity, need or entitlement. Finally, the judgement of justice may focus on the principles or values of justice, the rules implementing those values and the implementation of the rules. The last factor has important policy implications, as a

10 *See,* in the Belgian context, Catherine Zwetkoff, *Siting Hazardous Facilities: Public Values About the Distributive and Procedural Aspects of the Siting Decision Making Processes, Development of Methods for Obtaining Trade-off Judgements From the Public Suitable for Input to Decisions on the Siting of Hazardous Chemical Industry Installations* 36 (Progress Report E.C. contract CT92-00729 (1994).

11 Robert E. Lane, *Market Justice, Political Justice*, 80 **Am. Pol. Sci. Rev.** 383, (1986).

conflict about values is less tractable than a conflict about the implementation of a rule of justice.[12]

It is proposed that if any conflict resolution process aims at restoring the individual feeling of justice, citizens are reluctant to use mediation because they believe that formal justice better fits their framing of the dispute in terms of fairness. Examining the public discourse on mediation and its social legitimacy answers issues derived from the above explanation. For example, is the advocates of mediation discourse congruent with common social beliefs about the effectiveness of mediation verse litigation, in adhering to citizens' values and rules of justice? Since citizens have the choice between mediation and court litigation, it is useful to compare how each issue varies between the two types of procedure. These comparisons are preceded below.

The Normative Standards Activated by Mediation and Court Litigation

Very broadly, mediation substitutes horizontal, decentralized and non-routine relationships for vertical, centralized and routine relationships between the decision-maker and affected parties.

For example, in contrast with court litigation which is relatively closed to people with limited resources, mediation is open, making it fairer. Mediation is fairer because it addresses the needs of parties as well as their rights. In using everyday language, mediation is sympathetic to individual needs and social concerns. Mediation differs from conventional approaches where the third party, or judge, uses a specialized language that all parties may not understand. Mediation also conveys messages about the openness of the process. Meetings between parties are casual and organised during non-work time. Additionally, meetings take place in comfortable and affordable locations. This is in sharp contrast to the characteristics of court litigation that takes place during working hours, in a solemn place, with a judge dressed in elaborate costume and with long established judicial ritual. These messages are meant to impress the parties with the autonomy of justice and its strict compliance with an elaborated set of procedural rules.[13] These rules are set to regulate the relationships

12 Morton Deutsch et al., *Constructive Conflict Resolution: Principles, Training, and Research,* 50 **J. Soc. Iss.** 13 (1994).

13 Sally Merry, *Varieties of Mediation Performance: Replicating Differences*

during the litigation phase, structure the decision making process and help impose a non-negotiable settlement on the parties.

In comparison with conventional and court litigation approaches, mediation offers citizens more control over the process and the decision. Parties are recognized and empowered to negotiate a solution. Participation and negotiation are the trademarks of mediation while constraint and resistance are those of the conventional procedures. This difference has possible drawbacks when parties are unequal. To address this issue, Espace Environment emphasizes that the mediator's professionalism guarantees a fair and neutral process.

In mediation the quality of the negotiated settlement is a direct outcome of the quality of the process. Prioritizing the accuracy and appropriateness of the solution to the local context brings satisfaction to the parties during mediation. In contrast, it is consistency that is most germane to litigation. Guaranteeing that the same problem receives an identical treatment across time and space is a major component of formal court procedure. Consistency is relative because no legal and political order is absolutely irreversible.

Distributive justice criteria are also present in the public discourse on mediation. Litigation produces a decision about the distribution of outcomes that confirms or modifies the legal order. It contributes some certainty into social relationships, giving privilege to entitlement, and consistency across space and time. Mediation exerts an action on the local and present order and aims at an equilibrated distributive outcome. It gives privilege to both justice of need (access) and to proportion of inputs and outputs.

Relative Social Legitimacy of the Justice Discourse Underlying Mediation and Court Litigation

To examine which issues differentiate between public choice of mediation or court litigation, a comparison of the relevant elements of the public discourse on mediation was made. This was done using qualitative data from a participant observation of one environmental conflict where mediation was used,[14] and on self-reported opinions of court litigation expressed in various settings.[15]

"Access to Justice", **Access to Justice** (Allan Hutchinson ed., 1990).

14 Tomke Lask (1998), in this issue.

One major issue concerns the perceived execution of justice. For example, it may be that the reluctance of citizens to use mediation could be explained by the relative lack of institutionalization of Espace Environment's model. Their model sets "informal" and relatively vague rules in comparison with those that apply to court litigation. The typical outcome of an informal process is a settlement formulated in vague or ambiguous terms rather than decisive language. Without precise and objective yardsticks to monitor the implementation of the mediation and settlement's fairness, how could citizens contest the rules or get an opportunity to correct a poor settlement without litigation? In other words, a major flaw of the mediation model is that it deprives potential users of the objective and consistent grounds to challenge the way a mediation functions or the settlement it reaches.

Other issues are raised in consideration of fairness, values and rules. The public discourse on mediation mobilizes several procedural and distributive criteria that give different meanings from those in the conventional and court litigation approaches. To what extent are the mediation and court litigation results consistent with what citizens think of a just solution?

Mediation is presented as a litigation alternative because it is supposed to respond to citizen demands for more recognition and empowerment, as well as provide a better solution to satisfy the needs of the parties. But case studies challenge promoters' prevalent view that mediation fits the citizens' demand for a more transformative voice, giving them control over the process, representation and the decision.

Mediation implicitly recognizes citizens as stakeholders insofar as they have an individual story to tell. It explicitly empowers citizens to speak in defense of their individual interests but limits the scope of their empowerment to the negotiation of a local order. In doing so, mediation fails to meet the expectations of most opponents who claim an entitlement to participate in the negotiation of a more global and complex order. Moreover, the recognition and empowerment functions of mediation appear to be reactions raised by the collective interests to increasingly complex problems. The public discourse is explicitly based on the classical clear-cut boundary between public authorities' collective

15 Zwetkoff, *supra* note 10.

interest and individual citizens' interests. However, individuals have gained an increased number and diversity of rights. To be effectively implemented, they must become part of a new and socially legitimate political order. For example, the subjective element in the Belgian law regulating the right to a "safe, healthy and nice environment" illustrates the process by which individuals identify the collective/public recognition of a need that blurs the distinction between the collective/public and the individual sphere.

Citizens may also disagree with their final recognition and empowerment. As a consequence of the recognition and empowerment found in mediation, parties are given the opportunity to exercise autonomy, choice and self-determination. As a result, mediation promotes a more accurate and fair problem-solving approach.

Case histories suggest that mediation appeals more to parties involved in small claim conflicts, such as neighbourhood disputes, where the idea of seeking a locally negotiated order is consistent with micro-justice. It might be less appropriate to the kinds of dispute where die-hard pro-environmental activists forward macro-justice and utopian concerns for an extended moral community. Such opponents might prefer court litigation where the judge may be pressed in a consistent and codified way to change the legal and political order. For group and individual motive-driven opponents, the relatively irreversible judicial decision and strict codified procedure may soothe their qualms about displacing the burden to another local community. Hence, key questions for the promoters of mediation are: what proportion of opponents are likely to be interested in mediation, and what strategy might be effective in competing with die-hard activists in enlisting citizens in the initial stage of problematisation of the conflict?

Conclusion

This research focused on mediation for several reasons. Mediation is a social practice widely used in many areas of litigation. It is consistent with the Belgian political culture that gives privilege to agreement and cooperativeness in conflict management. To some extent it also meets citizens' demands for recognition and empowerment. Despite the efforts of institutional actors to promote it, environmental mediation has not expanded much further than neighbourhood disputes.

Policy thinkers should gain insight into situations where citizens prefer court litigation over mediation. Might it be that, despite wide attention from public authorities, scholars and practitioners, the lay audience resists the mediation because it rightfully suspects the quality of the endeavor? Or, is it really a workable alternative to conventional approaches that simply requires some fine-tuning?

In this paper some limited views were offered on the internal consistency of the mediation methodology and the external validity of the process; its social legitimacy. The first concern was to identify critical aspects that might be given more attention in order to fine-tune the program. This endeavor only makes sense if mediation is seen as a socially legitimate and sufficiently effective process. Hence, the second concern was to explore some of the conditions that affect the appropriateness of mediation for the kinds of disputes that occur in the environmental field.

The justice discourses, underlying mediation, and court litigation were reviewed in the light of the distributive and procedural criteria. The shared beliefs about social legitimacy and effectiveness of mediation compared to court litigation should help chart the way to future investigation of critical issues in both methodologies.

Analysis of the internal consistency of the "rules" of mediation and of its social legitimacy suggests that a more structured and certain process might partly overcome citizens' reluctance to use mediation. The critical aspects that might benefit from more institutionalization are:

(a) whether or not access is voluntary;
(b) the opportunity given to the mediator to expand rather than to narrow the problem;
(c) the nature of the language used by the mediator;
(d) the communication between the disputing forum and stakeholders;
(e) the monitoring of the implementation of the settlement; and
(f) the reversibility of poor quality agreements.

Mediation can be said to offer a "non-structure against structures"[16] Hence, the pragmatic costs and benefits of

16 Merry, *supra* note 13, at 17.

institutionalizing mediation by embedding it into an administrative structure such as in the Canadian BAPE,[17] or by fostering formal procedural rules by the parties in something like a mini-trial,[18] should be carefully identified in light of these experiences.

However, both converge on strictly enforcing codified and formal procedure. The BAPE, an institutional public actor that is financially and politically independent from any party, implements a mandatory mediation, though parties may withdraw at any time. It applies the same codified procedure across cases to ensure consistency. The BAPE explicitly addresses the issue of communication between the parties.

The mini-trial formula offers the largest range of choices. Parties may choose a mini-trial rather than litigation. With a neutral advisor, they define the procedural rules and the outcome. The language used in the process is legal, and parties are assisted by advisors with legal training. This fact has positive implications for the formulation of the settlement and yields specific indicators of objectives and performance.

The study's purpose was to gain insight into the appropriateness of mediation to solve environmental disputes. When a party wishes to expand the problem to include new facts, situations and populations, can mediation produce a locally valid settlement when addressing a dispute of this size? This is an empirical question that could be further investigated after more structure and certainty have been injected into mediation. Presumably, environmental activists will never favor the mechanism. However, all potential opponents do not speak in one voice. If mediation develops more consistent procedural rules and an institutionalized and interactive relationship between stakeholders and their spokespersons, fewer disputants would reject mediation for fear of transferring the burden to others for whom they feel responsible.



17 Symposium, *The Pope's Mediation on Environmental Matters: An Efficient, Effective and Beneficial Process*, **In Symposium on Mediation and Arbitration on Commercial Fields: A New and Realist Approach** (Institute Wilson & Lafleur, 1995).

18 Merry, *supra* note 13, at 17.