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Environmental Mediation

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Contents

Abstract 7

Glossary 8

Introduction 9

Mediation as Third Party Intervention 13

A Brief History of Mediation in the United States 17

Special Characteristics of Mediation in Environmental Disputes 19

Mounting Environmental Pressures in Israel 25

The Status of Environmental Mediation in Israel 27

Conclusions — Some Current Issues and New Directions 33

Bibliography 37

Abstract

Mediation is a type of third party intervention in environmental and other kinds of disputes. Its characteristics — voluntary participation and agreement, confidentiality of exchanges among parties, the search for mutually satisfactory solutions — are well suited for the multi-party, complex context of environmental conflicts. Mediation is often used concurrently with other modes of conflict management. Some current challenging issues for environmental mediation include: the production and communication of technical data to lay publics, especially concerning risks; mediator training and evaluation; approach to conflicts that are resistant to resolution; the timing of intervention; and whether agreement should be sought in all cases. Attention is also given to the application of environmental mediation techniques in Israel.

Glossary

Arbitration: A dispute resolution mechanism where, after a hearing at which all parties have had the opportunity to be heard, a neutral third party renders a decision — binding or non-binding as per prior agreement.

Consensus: Consensus is an agreement in which all parties to a dispute can understand, live with and 'support' (accept) the decision. The power of consensus comes from agreement among all those who might otherwise differ or block implementation.

Mediation: The intervention by an impartial party that facilitates movement towards a negotiated settlement, by modifying the physical and social structure of the dispute, altering the issue structure, and increasing disputants motivation to reach an agreement. The mediator may be either an individual or a team, appointed by an outside party or by the stakeholders.

Negotiation: Any instance in which two or more parties are communicating, each for the purpose of influencing the other's decision.

Negotiated settlements: The mutual gains approach to negotiation as a value creating process marked by different stages or phases in order to reconcile the different positions of the parties. Also, an instrument of conflict management whereby the parties to a conflict voluntarily manage or resolve the distribution of values and resources among them.

Introduction

Conflicts within and between tribes, religious sects, ethnic groups, and nations have been handled both peacefully and otherwise from the beginning of history, and — in many cases it seems — with third party intervention. Some mediation-like processes far pre-date formal court procedures, and some cultures have quite a remarkable tradition that survives in parallel with other, more formal conflict management and justice means. Nowadays, in some countries where justice meted through the court system is extremely slow and may take up to several years for a hearing (e.g., Argentina, Mexico, the United States and, more recently, Israel), mediation has come to be seen as a viable alternative to courts for resolving civil cases.

Conventional dispute resolution is often entrusted to the legislative branch (by vote) or the judicial system (by law), or to an administrative arena where decisions are made according to some technical expertise. When legislative action and administrative rulings are disputed and result in court action, the focus frequently centers on technicalities of law and procedure, rather than substantive issues.

The frequent dissatisfaction of the parties when disputes are settled through these traditional channels has led researchers and practitioners to explore alternative dispute resolution methodologies to supplement conventional systems. In recent years, scholarly attention has begun to focus on the use of social scientific knowledge to develop methods for resolving conflicts (Fisher and Ury, 1981; Raiffa, 1982; Shea, 1983; Lewicki and Litterer, 1985; Lax and Sebenius, 1986; Ury, Brett, and Goldberg, 1988; Gray, 1989; Kaufman and Duncan, 1989; Breslin and Rubin, 1991; Pruitt and Carnevale, 1993). Substantial literature also addresses the application of these methods to environmental and public sector disputes (Bacow and Wheeler, 1984; Bingham, 1986; Amy, 1987; Susskind, 1994; Shmueli and Vranesky, 1996; Susskind, McKearnan, and Thomas-Larmer, 2000). A synopsis of some of the basic differences between the conventional and alternative approaches to dispute resolution is summarized briefly in Table 1. As with many synopses, these characterizations are true sometimes, but not always, and not along all dimensions.

Table 1: Alternative contrasted with traditional approaches to public policy making

Traditional Approach	*Alternative Dispute Resolution Methodologies*
Crisis forces policy choices	Early discussion of policy options
Little contact or personal exchange amongst stakeholders	Face-to-face discussion among parties to encourage candor and trust
Polarization occurs before options can be explored	Interests explored rather than positions immediately taken
Facts selectively used to support partisan positions	Experts used to help establish and clarify factual issues
Outcome can include frustration and residual distrust	Explicitly collaborative, but does not try to hide disagreements
No neutral convenor assists parties to explore issues and negotiate	Neutral convenor may assist parties to identify issues, clarify facts, and explore options

The contention is that outcomes produced by negotiated settlements (alternative dispute resolution methodologies) often satisfy these conditions better than those reached by litigation or political compromise (traditional approaches).

However, as with traditional approaches, alternative dispute resolution techniques may lead as readily to socially unjust outcomes, unless precautions are taken and preparations made. Conflict managers must be trained to be aware of social-justice aspects of conflict resolution and the ethical dilemmas that arise. The processes should aim to increase the gains for all groups involved in the conflict, rather than only for some. Susskind and Cruikshank (1987) identify four characteristics of good negotiated settlements: fairness, efficiency, wisdom and stability. To expand on this, criteria for evaluating methods of conflict management include:

- agreement if agreement is possible
- maximization of the legitimate interests of each side
    - personal interests
    - mutual interests
- fairness
    - appears fair in retrospect
    - does not unnecessarily impinge on outside interests
    - sets a good precedent for the future
- durability — produces long-lasting agreements
- efficiency — produces quick, low cost decisions
- stability — improves (or does not damage) relationships between parties, and
- adaptability — works in a variety of situations and conflict types.

There is a variety of participatory and consensus-building processes in public policy, ranging from stylized and rhetorical to interactional and communicative, to dynamic and transformative. Approaches to conflict resolution, as applied to environmental disputes, include negotiation, mediation and arbitration.

Environmental problems are linked to the gamut of human activities — personal, local, national, and increasingly, international. Environmental legislation and management require complex coordinating processes. On the national level, many diverse agencies and interests may be involved, such as those for physical planning, industry, agriculture, parks and recreation, coastal and floodplain management, energy and finance. In the international arena, the complexities are compounded by multiple governments with varying levels of commitment to the stated objectives. At the local and regional levels, the involved parties include community groups and individual interests, as well as private corporations and governmental agencies.

Typical characteristics of environmental public policy disputes at all levels include:

- multi-party, multi-issue
- complex issues
- differing perspectives
- interests based on principles and values as well as on outcomes
- loosely knit community and nonprofit interest groups
- ad hoc relationship between disputants
- issues not clearly defined
- unequal resources, power and expertise, and
- uncertainty.

This article focuses on mediation and its uses in managing environmental conflicts. The first section characterizes the mediation process in the context of various forms of third party intervention. The second section briefly outlines its history in the United States, beginning with use in labor-management disputes and expanding to a variety of other contexts including environmental and public disputes. The third section focuses on the special characteristics of environmental conflicts and the ensuing challenges of mediating them. The fourth section briefly presents the mounting environmental pressures in Israel and the current status of environmental mediation. The fifth section explores some current issues and future directions of third party intervention in environmental conflicts.

Mediation as Third Party Intervention

Mediation is a form of third party intervention in disputes. These parties may be individuals, groups, or organizations called, appointed, or volunteering to assist conflicting parties in managing or settling differences. Although not necessarily recognized as such, a number of familiar roles amount to third party intervention. For example, village elders, rabbis, parents, matchmakers, lawyers, arbitrators, mediators, policemen, consultants, managers, judges, the United Nations, the World Bank and the International Court at the Hague all exercise some form of intervention in conflicts. In most cases, their key shared characteristic is that they are neither a contributing cause of the situation in which they intervene, nor a direct beneficiary of a specific outcome. They are mostly interested in seeing conflict managed constructively or resolved. Differences among third parties include mandate, trigger and timing of the intervention, payoffs, techniques, personal and process goals, and performance measures. These differences matter when matching conflict situations with suitable intervention, in order to increase the likelihood of success. Recognition of the significant role played by individuals in mediating conflicts was the award of the Nobel Peace prize to Jimmy Carter. Both in his roles as President at Camp David and as a prestigious personality in private life, he played an important role in mediating such conflicts as the Bosnian war, elections in Mozanbique and Jamaica, and human rights abuses in East Timor.

During mediation, a *non-partisan* third party — the mediator — assists two or more disputing parties in reaching *a negotiated settlement*. *Participation is voluntary* for all: any of the disputing parties and the mediator can opt out at any time. *Agreement is voluntary* too. For example, in the Wazzani water dispute, Lebanon has thus far refused mediation. The parties *own the mediated agreement,* and in most cases are solely responsible for implementation and compliance. Mediators derive their requisite non-partisanship from lack of a direct stake in the outcome of disputes, and lack of alignment or power relationship with any of the disputants. Mediators are expected to hold communications of the concerned parties in strict *confidentiality*.

Based on its characteristics, mediation is best suited to interests-based disputes, as opposed to rights- or power-based disputes. In the former, parties differ in their

preference for tangible outcomes (for example, actions, payments, specific behaviors) and for intangible ones (for example, relationships or attitudes). They are not seeking to decide who is right or wrong according to laws or rules (rights-based dispute). They typically lack the ability — whether rooted in formal mandate, position or resources — to prevail by imposing a preferred outcome on others (power-based disputes), or to attain that outcome unilaterally. Interest-based situations often have a mixed-motive nature, in that the parties have both joint and competitive interests and despite their differences need each other for a mutually agreeable outcome to prevail. They must negotiate this outcome, and they can benefit from the assistance of a mediator especially when there are communication difficulties, a history of fraught relationships, numerous interested and affected parties, lack of a defined process, or a high level of process or content complexity.

While the parties' ownership of the solution seems to be a prevalent value in most contexts, the actual practices differ in implementation. For example, in school and community disputes, mediators are trained to scrupulously avoid any input in the crafting of solutions. In divorce and labor-management disputes, the experienced mediator's input is welcome and even expected, as long as it is perceived as remaining neutral. In environmental, public and international disputes that are highly complex, mediator input in the design of solutions is not unusual, even when the mediator is perceived, or known, to be non-partisan but not to be neutral. Across contexts, however, the usual mediator practice is to encourage parties to the extent possible to take charge of the process of crafting a joint agreement.

In principle, mediation entails a similar set of steps and practices in all contexts, including:

- an assessment stage
- design of the process
- an interactive forum for parties to explain their case and listen to each other
- some form of problem solving or generation of alternatives, and
- the crafting of an agreement.

However, the contexts in which mediation occurs differ extensively and have given rise to practices responsive to these differences. Some of the factors critical to the mediation process are:

- the number of parties in a dispute
- the type of participation (whether direct or by representation)
- the extent of power balance among parties
- resources and skills
- the time horizon for negotiations and for outcomes to materialize
- the nature and size of stakes and of outcome effects
- the existence of set procedures for initiating and for carrying out the mediation process
- the presence or absence of an organizational structure
- the substantive content and its complexity, and
- the nature and history of relationships among the disputing parties.

In these different contexts, mediators come into disputes via different avenues. In school peer mediation, there is a core of trained student mediators who get assigned by an adult coordinator to disputes as they arise. Mediators working in court programs for small claims or landlord-tenant disputes are assigned by court procedure. Divorce and business mediators are selected by disputants often based on reputation. Some labor-management disputes have mandatory mediation as a result of contractual agreement under certain conditions, and then professional mediators are assigned from an available pool, subject to the parties' acceptance. Environmental and public disputes mediators are called in by parties based on their reputation.

Not surprisingly, mediators operating in these diverse contexts need matching levels of substantive and process training, knowledge and experience. There are context-specific traditions and norms, as well as levels of professionalization and compensation. For example, some community, small claims and landlord-tenant mediators are volunteers, with typically limited training. In contrast, labor-

management, environmental, business and international mediators tend to have extensive training, experience and content knowledge, and command considerable compensation for their services.

A Brief History of Mediation in the United States

In the United States, modern forms of mediation have evolved rapidly in the second half of the 20th century. As in other Western countries, mediation has taken hold in many arenas for several reasons. In contexts such as divorce, small claims or landlord tenant disputes, where mediation is an alternative to court-based procedures, it appears less costly and more expeditious. In some situations such as labor-management disputes, mediation is sometimes mandated by law and is amenable to combination with procedures such as arbitration (for example med-arb, med-then-arb, med-rec). The most novel form of intervention is on-line mediation of commercial or "e-disputes," responding to needs that arise from the increasing volume of internet transactions such as auctions and the purchase of goods, as well as disputes over copyrighted domain names. In public and community disputes, mediation fills a vacuum left by lack of other clear, established procedures for resolving conflicts. In some of these contexts, as well as in environmental disputes, mediation sometimes follows litigation procedures in which some disputants engage at the outset to get the attention of other parties, or is conducted in parallel with legal procedures, because it is expected to save time and costs as well as allow parties to maintain or even improve their relationships, which are often left frayed by court processes.

Experiments with environmental mediation began in the United States in the mid-1970s, as an extension of techniques that were being used successfully in community disputes. In one of the first test cases, Gerald Cormick and Jane McCarthy of the University of Washington's Environmental Mediation Project were appointed by the governor of Washington State to serve as mediators in a dispute among environmentalists, farmers, developers, and public officials over the damming of the Snoqualmie River. The resulting agreement illustrated one of mediation's main assets — its capacity to generate creative solutions that satisfy the interests of all parties invloved. Sullivan (1979) notes:

> "Although the original conflict arose over the single issue of dam construction, the communication required in bargaining helped change the shape of the conflict. The negotiation changed from a yes/no dam issue into a search for environmentally acceptable flood control measures. Both dam proponents and

opponents moved beyond their original misconceptions of the other side and dealt with each other's real needs and concerns."

In the past twenty years, due in large part to concerted training and development efforts, the American style of mediation has been effectively exported to other continents. In most countries the transplanted model has acquired a local flavor, as practitioners have adapted the key ideas to the local culture and needs. Nevertheless, such export raises some important ethical and practical questions regarding the underlying expectation that the American mediation model is suitable, with adequate modifications, to any cultural and political context.

Special Characteristics of Mediation in Environmental Disputes

Environmental disputes sometimes erupt over a facility siting initiative that changes the landscape and the pattern of activities around it, including the natural features. At other times, people discover past or current environmental damage in need of remedy, or that are threats to human health. Frequently, a limited natural resource is at stake and parties differ on how it should be used, by whom and to what extent. Conflicts are deemed environmental when waged over a natural resource; when human activity, whether proposed, in process, or in the past, is believed to affect negatively a natural resource such as air, soil or water, and through them human health; or when standards and regulations are imposed on certain activities in order to protect nature. Examples of conflict over scarce resources include cases of sharing of water resources in arid areas, exploitation of oil and mineral reserves lying in regions of great natural value, or intense logging activities that disrupt valuable ecosystems. Examples of environmental harm include farming practices that pollute the soil and water or emit highly unpleasant odors, factory emissions that pollute the air, old landfills that threaten to contaminate their surroundings, or brownfields — urban sites that cannot be put to use because of the prohibitive costs of cleaning them up to current standards for their intended uses. Regulatory examples include the setting of clean air, soil and water standards, and of hazardous waste transportation and disposal.

Environmental conflicts encompass a great variety of disputes in terms such as issues, scale, parties, history and conflict management processes. They can erupt at the neighborhood level or involve cities, regions, and entire states or countries. Since environmental features such as bodies of water, wildlife habitat or air movements do not recognize administrative boundaries, there are also transboundary environmental disputes that pit countries against each other over a scarce resource, or pollution.

Environmental conflicts differ sufficiently in scale to present difficulty to those studying them or attempting to intervene to help manage them. Scale is not the only difference, however. For many conflicts falling into broad categories such as scarce resources, facility siting, or regulation design, an observer can predict with

fair accuracy who is likely to be involved and what some of the key issues will be. Yet each conflict has a sufficient number of specific characteristics to make it quite unlike other conflicts even when they share scale, issues or types of stakeholders. Each environmental conflict has a unique cast of characters, a history unlike any other except in broad strokes, a singular pattern of resources, inter-relationships among parties, a special set of issues and a unique set of moves that defies simple classification and comparison. Although some categories of dispute are of a specific scale (divorce, for example, involves only two key parties) or of a specific range of issues (as in labor management), environmental disputes cover a remarkable range along most of their dimensions.

A direct consequence of the variety of environmental conflicts is the necessity to tailor intervention to each situation by matching its complexity and uniqueness, resisting the inclination to liken parties to each other from conflict to conflict, or to frame them based on past experiences that may not be sufficiently similar to warrant such comparisons. Framing here refers to the process of attributing to some parties certain characteristics based not on direct interaction with them, but rather on their belonging to a certain class of stakeholders by role or interest. So for example, environmentalists are sometimes labeled "tree-huggers" by developers, while anyone associated with a manufacturing facility might be viewed by environmentalists as a "polluter". Engineers and scientists are perceived at times as narrow-minded and lacking imagination, and regulators might be expected by industry people to be "out to get them". Such characterization frames are detrimental to conflict management because they act as filters for the needed information exchanges among parties. Some might be inclined not to hear what others are saying because they think they already know it based on the frames.

Another conflict management challenge that arises from the differences among environmental disputes relates to evaluation of intervention processes such as mediation. Many anticipate that mediation can be very helpful to environmental conflicts for reasons such as cost of process, satisfaction of parties with process and outcomes, the learning that occurs for all and the quality of relationships that develops among parties. However, these benefits are very difficult to document and prove in comparison to other, traditional processes for resolving environmental disputes, such as court or arbitrators' decisions. In the absence of conclusive evidence that the advantages of mediation are real, many disputants will choose

more costly or less satisfactory avenues for waging their conflict. Should the advantages of mediation be exaggerated, it may be an unwise choice where other alternatives exist. Therefore, the conflict assessment stage of environmental dispute resolution is critical for deriving some indications for situations in which it should be favored, as opposed to situations in which other means should be preferred.

Environmental conflicts often involve numerous parties interested either because they would be affected by the outcomes, because they are responsible for them (if they are in administrative or regulatory positions) or because their values could be challenged by the outcomes. Interests of those involved can vary widely. For example, while an elected official or regulator might have the horizon of the time lapse between elections, a mobile professional or a business may consider the time it takes to move to a different location, and people who are not as mobile may have horizons lasting a generation or more. Environmentalists often champion a longer horizon, trying to protect interests of those not yet born and therefore not represented at the negotiation table. Deciding who should be party to negotiations and mediation, ensuring their presence for processes that sometimes extend over months and years, and providing some assistance in developing a common language are issues to be considered in such a context.

Representation is also challenging. Those who have the time and resources to participate in a mediation process are not necessarily representative of the interest groups affected by the decisions issuing from this process. Special effort is needed to find participants willing to give their time and also deliver the duties of representation, including reporting back to constituents and bringing back the issues and their ideas to the process.

In many cases, the disputed issues can be highly technical in nature and therefore difficult for lay parties to understand and evaluate. As a result, parties need scientific information and advice from professionals, in understandable ways. Still they may lack the ability to assess the quality of such information, as well as the means to acquire it. Trust, and lack of it, crop up frequently as obstacles to conflict management in such cases. People who feel otherwise competent, at times holding important decision making positions, resent the need to depend on information they do not have the skills to examine critically. As a result, they often avoid using relevant information to the detriment of the ensuing outcomes. The lack of communication between the scientific and other communities is due to a mutual

lack of validation of the special knowledge each might have. Technocrats involved in environmental disputes tend to discount local information brought to the negotiation table by lay parties.

Two particularly difficult aspects for the lay public to understand and factor into their decisions are risk information and the uncertainty surrounding environmental issues and consequences of decisions. The lay public ranks risks, including environmental risks, differently from risk rankings that are derived by scientific means, typically discounting familiar risks and those taken by their own choice. While that is not entirely surprising, it has consequences for environmental disputes in which such risks are at the heart of the debate. For many situations including cutting-edge technologies such as genetically altering crops, the risks are as yet largely unknown. Even when scientific knowledge exists, its application to a specific situation is surrounded by uncertainty that non-scientists often mistake for untrustworthiness on the part of those producing the models and data on which they base their findings. There is a widely shared expectation that scientifically derived information be clear and definitive, rather than contingent. Therefore, the less one knows about environmental science, the more one is likely to be dissatisfied by the answers it can give to a particular problem. As a consequence, although the best of what is known should be made available as a resource for decision making that affects the environment, there are great disincentives to the use of such information, resulting in poor environmental outcomes.

There is often no clear process for expressing dissatisfaction with environmental issues. For this reason, environmental disputes frequently begin with a law suit brought by one party against others because there is no other formal means of calling attention to the problems. The environmental context is one of the few in which law suits and several means of conflict resolution, including mediation, may occur concurrently. Mediators of environmental disputes find themselves required to design the process of mediation to a greater extent than in other contexts that have well-accepted and known procedures.

The outcomes of decisions that affect the environment may accrue in the very long run, when those feuding or making the key decisions might no longer have to live with the consequences. The conflicts themselves may last for long times, often up to decades, and recur in dispute episodes that may be resolved without the underlying conflict being laid to rest. Parties develop relationships and mutual

images of each other (frames) over time. Past interactions cast a long shadow, as parties may continue to fight old battles during a new dispute episode.

Mediation of environmental disputes has special features, some unique, that match well their characteristics:

- it can accommodate several parties
- its flexible process design can extend over time as needed
- the voluntary aspects increase some parties' level of comfort and their commitment to implement joint decisions
- it often preserves or improves the relationships among parties who will, in all likelihood, have to meet again and negotiate over the same or other issues
- participation in environmental mediation serves to educate parties to process and issues, with effects lasting beyond the current dispute.

If mediation does succeed, the collective memory of a positive experience will help in future encounters.

The specific model of a mediation process applied to environmental conflicts may differ in some of its key aspects from other settings (such as labor-management or organizational disputes, landlord-tenant, or divorce). Environmental mediation is initiated in various ways, including a party with previous experience proposing it, an agency offering to sponsor it, or a party offering to play that role. The parties have to agree to the choice of mediator (or mediation team). The process may begin with an assessment, whereby the mediator evaluates the situation, identifies parties that should be at the table and gauges the fit between the situation and what mediation can offer. Assessment involves studying the situation, its history, issues and recent events, and interviews with parties or stakeholders, analysis of findings and a report typically available to all concerned. Mediators then need to plan the process in consultation with the parties, including location, frequency and duration of meetings and agendas for each. Mediation can occur concurrently with other processes of dispute resolution including court procedures, and it can proceed in

ways that are not necessarily sequential as parties may need to backtrack for data collection, resolving side issues and even renegotiating the process. During the process, mediators may need to help parties locate specialized information, often with heavy scientific content, which they may need assistance in understanding. Data mediation is also needed sometimes, when parties need the assurance of neutrality on the part of those providing data critical to the decisions at hand. Depending on how protracted the dispute is, the outcome may range from dialogue to agreements and joint decisions to be implemented by the parties. As in other contexts, the drawing of agreements is a very important step, since their quality — clarity, specification of mutually contingent moves, deadlines, and responsibilities — may affect their chances of implementation and their durability.

While mediation meets with success in many cases, there are times when parties have to acknowledge that they cannot bridge their deep differences and have to resort to other means of dealing with the problems that brought them to the mediation table. In environmental disputes, lack of agreement has consequences for the environment that do not stop, and are not put on hold by the mediation process. For example, a solution is needed to some problem involving deterioration of a resource whose deterioration continues in the absence of some joint decision to mitigate it. In this sense, disputes with environmental consequences are unlike disputes in many other contexts, where lack of agreement usually amounts to a continuation of the status quo — not necessarily desirable, but possibly stable. However, when parties to an environmental dispute have a bias toward non-action and concentrate on possible harmful consequences, perpetuation of the status quo can have a more harmful effect. The environment is worse for such paralysis.

Mounting Environmental Pressures in Israel

The marked increase in the frequency and intensity of environmental disputes in Israel is a consequence of the country's rapidly growing population and economic development. Continued concentration of population and economic activities within the national core (the Tel Aviv area and the Central Coastal Plain) has already produced extraordinarily high densities as urban expansion has swallowed up open spaces and agricultural lands, and placed heavy strains on the country's infrastructure. The country's population is projected to expand from 6.9 million in 2005 (nearly forty percent of which resides within the Core) to a projected eight million by the year 2020. As this is within the limited land area of 21,500 square kilometers, it is virtually guaranteed that environmental disputes will become endemic.

Most conflicts over the quality of the environment revolve around public policy issues regarding either development versus preservation, or regulation of pollution. Whereas these issues are often identified with planning, other environmental policies are frequently embedded in regulatory action. Israel has strong, centralized planning linked to relatively weaker environmental regulations. Both the institutional capacity of its planning bodies and the national environmental regulatory framework are severely challenged by the mounting environmental disputes.

The mechanisms for controlling development decisions in Israel are diffused among multiple political entities — central and local authorities, as well as professional bodies appointed by them. These, in turn, use planning and building committees operating under the Planning and Building Law of 1965. In many cases, unfortunately, these mechanisms are unsuccessful in coping with the increasing multiplicity of disputes revolving around planning, construction and the quality of the environment. Projects are often carried out in such a way that none of the parties involved in the dispute surrounding them are satisfied - the developers are frustrated by having lost valuable time, and having to make unwelcome changes that raise their costs; and the opponents are disappointed because the project is put in place despite their strong objections and, in many cases, also because they consider the changes to the plans inadequate.

Beyond these costs to participants, many disputes bring projects to a halt, including some of national importance. Feitelson (2001) points out that there are significant environmental costs to the system as a whole. Bad situations are worsened when stalemates over siting result in crucial environmental infrastructure (often locally unwanted land uses [LULU], such as landfills) not being built. When conflicts preclude the possibility of existing facilities being expanded or the building of new facilities, the ramifications are deleterious to the environment as a whole. All of this indicates a real and urgent need for a different approach to reducing the intensity and number of conflicts surrounding environmental issues, and to producing more satisfactory and sustainable results in such disputes.

Only since the late 1990's have environmental dispute resolution techniques been introduced into Israel's policy-making arena[1], although they have been developed and practiced in the U.S. and Europe for over twenty-five years. Despite the progress that has been made, protracted disputes are inevitable, and call for continued refinement and cultural adaptation of these techniques. Such refinement, as applied to the Israeli setting, is what is occurring today.

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[1] A three-day workshop led by Lawrence Susskind (of the Consensus Building Institute, Cambridge, Massachusetts) on Conflict Resolution in the Areas of Planning and Environment was held in January 1999. The workshop was sponsored by the Israel Center for Negotiation and the Ministries of Environment and Justice. The purpose was to introduce concepts of environmental dispute resolution to Israeli decision-makers and stakeholders.

The Status of Environmental Mediation in Israel

As noted, concepts of environmental mediation were first introduced to Israeli environmental decision-makers through an International Workshop on Conflict Resolution in the Areas of Planning and the Environment, in January 1999. The Justice and Environmental ministries were among the initiators involved in this effort and have continued to take the lead. The workshop assembled a group of leading international experts on the subject of conflict resolution who worked with Israeli experts to promote the use of innovative methods in moderating complex conflicts. The facilitators reviewed approaches and methods that have been used successfully in the United States and Europe in resolving and moderating conflicts in the fields of planning and the environment, and began to examine whether and how these approaches could be internalized and adapted to the Israeli system.

Within the framework of the workshop, four conflicts were selected. All four had engendered strong public reactions and included complex interactions among numerous interested parties. These four conflicts were: Highway No. 6, representing a conflict over roads; Ben Gurion 2000, representing conflict over airports; the Tel Aviv beaches, representing conflict in coastline development; and the Duda'im landfill, representing conflict in the field of solid waste. For each a conflict assessment was prepared which produced mapping, analysis and initial assessment of the ways in which the systems involved coped with the conflict (Ministry of Environment, 2002). The process by which environmental decision-makers and stakeholders in environmental disputes were introduced to the potential of mediation was to use these four long term conflicts, inviting the participants from each to spend two days around a negotiating table during which the facilitators demonstrated how environmental mediation might have furthered the management and resolution of the disputes. The workshop was the first in a series of training sessions which took place over the years in the Ministries of Environment, Justice and Interior at both national and regional levels to provide employees with concensus building and negotiation skills.

Following the workshop, first steps in applying mediation concepts and techniques in Israel have taken the form of capacity building, conflict assessments and a few interventions through mediation. Examples of such efforts follow.

A conflict assessment concerning the pollution of the Lower Kishon River in the Haifa metropolitan area proposed an intervention process to the stakeholders. In late December 2000, the Ministry of Environment, in seeking to promote a dialogue among the involved parties about the environmental future of the River and the community, commissioned the assessment which took place between January and June 2001. 30 stakeholders from 14 organizations were interviewed. (Shmueli and Ben Gal, 2001)

Shmueli and Ben Gal incorporated a framing typology into a classic assessment methodology (Susskind and Thomas-Larmer, 2000) and 'mapped' the dispute. This facilitated the subsequent steps of presenting the different frames to all stakeholders, explaining how the differences in framing influence the perception of the conflict, and exploring how this knowledge about differences can contribute to constructive intervention. Thirteen of the fourteen organizations involved were eager to pursue mediation. The Ministry of Environment, a primary stakeholder which had funded the assessment, felt that it could convince the others of the salience of their solution and chose not to pursue the mediation. Currently (2006) the issues remain unresolved.

Between January 2000 and December 2002, The Consensus Building Institute (CBI) of Cambridge Massachusetts, and the Israel-Palestine Center for Research and Information (IPCRI) of Israel and the West Bank, conducted the *Joint Environmental Mediation Service (JEMS)* which served a capacity-building function. JEMS goals were to introduce techniques of environmental conflict resolution to the Palestinian Territories and to Israel; train teams of Palestinian and Israeli practitioners in these techniques; and establish an institution that could provide mediation services on an ongoing basis to Israelis and Palestinians engaged in environment-related disputes. The Intifada of 2000 rendered the envisioned international cooperation difficult, and although JEMS continued its activities sporadically, much of the focus shifted to environmental disputes between Israeli Jews and Arabs. JEMS selected graduates of its training program to undertake a few conflict assessments, one of which involved a dispute over the establishment of a national park in Nahal Tzalmon (Abu Toama et al., 2001). After the assessment, a mediation of the dispute was undertaken.

The *Nahal Tzalmon* mediation took two and a half years. The Tzalmon national park, some of which is occupied by Arab-Israeli families, is in the Galilee region

of Northern Israel. Statuatory plans defining the park's boundaries were enacted more than 20 years ago. The park has not yet opened to the public, due to the continuous conflict between Israeli government authorities and the resident families over property rights affecting construction, land use, and nature preservation. The stakeholders included local residents, nongovernmental organizations (NGOs) and Israeli government officials. The intervention team consisted of 3 Israelis who had undergone JEMS training in environmental mediation. Two of the mediators were Jewish, one Arab, and the mediation took place over a period of 35 months, ending in an agreement which was signed on July 8, 2004 by many but not all of the stakeholders, with the non-signers being critical government authorities and an NGO. The agreement allows residents to remain on their land and it includes incentives, such as park employment, to ensure that they help preserve the natural environment.

Two years after the signing of the agreement, the situation in Nahal Tzalmon remains unchanged. The Arab farmers continue to till and develop their lands in defiance of the agreement. Central government authorities continue to oppose allowing for residential zoning (legal recognition of the residences) in the park area. The mediators continue to explore solutions.

An evaluation of the process that was undertaken by an employee of CBI and published in the January 2005 issue of the Negotiation Journal (Levine, 2005, 69), concludes by stating: "There is no question that the Nahal Tzalmon mediation process — despite its shortcomings and concerns about its implementation — was a pioneering effort that opened the door for the use of public consensus-building processes in planning efforts in Israel….and improved relationships acquired by the stakeholders….providing a transformative effect." An independent and subsequent evaluation undertaken within an academic context[2] differed both in focus and in scope (Khamaisi et al. 2005). Although the mediators were both Jewish and Arab, the mediation model used was directly taken from CBI, with

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[2] The evaluation and model were first presented in 2005: Khamaisi, Tarabiah and Shmueli, "Creating a Socially Adaptive Model for Managing and Resolving Environmental Conflicts in Divided Societies: Galilee (Israel) Conflicts as Demonstration Sites", *International Association for Conflict Management*, Seville, Spain, June 2005. Details forthcoming in dissertation by H. Tarabiah.

little cultural adaptation. The obstacles to implementation may actually be somewhat closing the doors to subsequent efforts. This evaluation is being used as a springboard or jumping-off point for exploring suggestions for a more culturally sensitive model for management of environmental conflicts whose disputants are both Arabs and Jews.

In 2004, with the conclusion of the Tzalmon mediation, JEMS established *'Mekomot'* to provide mediation services on an ongoing basis within Israel. To date it has conducted a number of conflict assessments. Also in 2004, the Ministry of Environment formed an intra-Ministry Mediation Steering Committee and developed a list of conflicts which in the Steering Committee's view might be approached through mediation. It contracted with *Mekomot* for a conflict assessment of a PGM (Plasma, Gasification-Pyrolysis, Melting) plant in *Iblin*, an Arab town in the Galilee. Proponents see PGM's process as combining waste elimination, energy recovery and formation of non-leaching inert residues, and providing a much needed solution for solid waste disposal. Opponents criticize lack of attention to environmental justice and siting issues, and the application of an unproved technology. Whereas opponents would be interested in expanding the issues for negotiation, the proponents would like to focus on the Iblin facility. The conflict assessment is in the final stages (Ben Gal et al., 2005) and a mediation process is expected to ensue. CBI itself is currently (2005) conducting a conflict assessment of issues involving the *Bedouins in the Negev* (Susskind, 2005).

A mediation effort concerning Israel's national hazardous waste site — *Ramat Hovav* began in October 2005, after completion of a conflict assessment (Braverman et al., 2005). In response to a suit brought by the Union of Industries (on behalf of the industries in Ramat Hovav) against the Ministry of Environment, the courts mandated a mediation process. Fifty percent of the process is being funded by the Industries, twenty-five by the Ministry of Environment and twenty-five percent by the Council for a Sustainable Negev. The process took place between October 2005 and January 2006 and currently an agreement is being drafted by the parties.

After only seven years, environmental mediation in Israel is still in its infancy. However, considering the input that has been invested in transferring the process, one might have expected more intensive application. Major barriers include capacity building and institutional attitudes.

Aside from the JEMS program, many other instructional efforts have been superficial. Some purported training sessions are brief workshops or seminars, often with a clientele without expertise in environmental or planning areas. The academic programs do not yet provide graduates with a deep understanding of the necessary tools.

Pervasive belief in professionalism and fear of losing control impede consensus building and collaborative efforts on the part of established agencies and private planners. Despite failures with the traditional approaches, the underlying concept of consensus building will continue to meet with resistance from most planners and planning agencies until it shows a record of success in the Israeli experience.

Conclusions — Some Current Issues and New Directions

Challenges facing environmental mediation encompass the disputes themselves, the mediators, the parties, the process and the outcomes. There is little consensus among environmental conflict professionals, researchers, and sponsors of intervention on many of these issues.

Environmental disputes range in terms of likelihood of reaching an agreement from very high to very nearly intractable. Even 'intractable' disputes that persist for years, may eventually be resolved with changes in the personalities of those involved, changes in values, technology or the physical environment. While there is no simple way to predict the likelihood for resolution of a dispute, there are certain indicators that signal the probability of a protracted struggle. They include a history of negative experiences among the parties, value-laden issues (such as property rights versus environmental quality), persistence over long time periods, and previous failed attempts at resolution. The mediator must be able to assess this factor from the outset. In a dispute that seems amenable to resolution, the mediator may pursue an agreement strategy, while in a protracted dispute the goals need to be scaled down to continued involvement and dialogue among the parties.

Another major obstacle to resolution of environmental disputes is disparity among stakeholders, or parties, which may be along several dimensions. These include a grasp of technical data and understanding of the consequences of various proposed solutions, negotiating skills and experience, resources and access to information and to decision makers, and time to give to the process. In theory, mediation is best suited to situations in which there is a power balance. In reality, power imbalances almost always exist, posing process and ethical problems to the intervenor who can neither alter the situation nor ignore it. The need to preserve neutrality is at odds with the desire to rectify power imbalances, and attempts to compensate for such imbalances are one of the major mediator challenges.

Representation is another stakeholder-related issue. In large-scale, long-term conflicts, meaningful participation in a mediation process is problematic. It is all but impossible to have every stakeholder participate directly, due to the sheer scale of the endeavor, which poses logistical problems as well as difficulties in

sustaining participation over the duration of the process. Therefore, some form of representation is needed so that those at the table can commit to be present at meetings and to communicate with constituents. They must also have the mandate and skill to make decisions and enter agreements on behalf of their constituents. Although it would seem that these are minimum conditions that can be easily fulfilled, the time and energy demands of environmental mediation processes are such that participation may dwindle and the quality of representation decline. As a result, decisions taken during mediation may be more difficult to implement.

Mediators considering intervention in environmental disputes have to possess the skills to contend with challenges already mentioned, such as process design to ensure meaningful and comprehensive participation. In addition, they have to be sensitive to the timing of their intervention — preferably at the moment in a dispute when parties come to the conclusion that mediation might be a better option than alternative processes available, such as unilateral action or litigation. Too early in a dispute, parties may not share information and ideas to the extent necessary for crafting a joint decision, because they may think other options are feasible and more attractive. If such sharing takes place too late, the parties may have become polarized after repeated failed exchanges, unilateral moves and heavy resource expenditures.

Even when the timing is right, the mediators must earn the parties' trust in their competency and ability to engage in an evenhanded process that is transparent to all parties. The stakeholders must trust the mediator's commitment to uphold confidentiality, help craft an implementable agreement or at least broker mutual understanding, and nurture the relationships among parties. In environmental disputes with wide public impact, where there is media interest in the process and outcome, the mediator must be skilled in handling the relationship and shielding the process from premature exposure to public scrutiny.

In environmental mediation there is the added issue of whether the mediators are independent professionals or sponsored by some organizations or public agencies, or even employed by them. Trust in the sponsoring agency frequently reflects on the mediators even before the parties have had any direct experience with them. Parties may have difficulty selecting a trustworthy mediator because there are not yet universally recognized credentialing processes that ensure any level of training, experience, and shared notions of what makes a good mediator.

Although there are now a few conflict management degree-granting institutions, mediation training tends to run the gamut in terms of duration, content, philosophy of mediation, skills and process models taught, and outcomes sought. The earlier labor relations mediators had come to their practice through the direct experience of negotiating for one of the sides. With the proliferation of arenas in which mediation is used, need for more formal training has increased. Some programs are context-specific, for example training mediators for small claims or for school disputes. Others adhere to the view that a few key concepts are important in all circumstances, from interpersonal to international conflicts, and therefore the context need not be specific. Some programs offer mentoring and co-mediation to help a newly minted mediator with feedback from more seasoned ones. One mediation school of thought holds that substantive knowledge of the issues in dispute is not necessary because the mediator's purview is the process and the communication around the issues. However, since environmental disputes are particularly laden with technical information, some hold that a mediator with shallow or no understanding of the issues will be less effective in assisting the parties to craft agreements, and may be unable to establish credibility. From the perspective of disputants, it is extremely difficult to assess the match between their needs and a mediator's qualifications. Therefore, reputation plays an important role in the selection process.

Why, how and when should mediation be evaluated? 'Formative evaluation' assessses on-going procedures and results to date with a view to altering the mediation strategy where deemed necessary. This helps to ferret out frames — the ways in which parties interpret their conflict and perceive each other's position.

'Summative or retroactive evaluation' — after the mediation process has concluded — serves several purposes. It gives feedback to the mediator, parties and sponsoring agency who are likely to interact in the future, possibly around the same or similar issues. It enables the mediator to reflect on the past, in order to learn and develop for improving performance in future disputes. It enables sponsors and parties to examine records in order to make decisions on whether mediation is appropriate and can be better for their specific situation than other approaches.

There are some interesting directions in which third party intervention is evolving in general, and specifically in environmental disputes. Mediation of disputes triggered by a crisis has given way to an attempt at consensus-building

aimed at solving problems before they become entrenched. Mediation and consensus-building share many features — voluntary participation, need for broad, meaningful representation and for skilled process design and facilitation, need to assist parties in interpreting highly technical information, as well as some of the characteristics of joint problem solving.

There are those who look to mediation to have a transformative effect that goes beyond the mere agreement on a particular dispute, and contributes to a new way of thinking for the parties. In some instances transformative effects become the purpose of mediation, replacing the more traditional goal of arriving at a settlement.

Mediation is a potentially powerful tool for the management and resolution of environmental conflicts. Although the culture and practice of mediation has not yet taken firm roots in the resolution of environmental conflicts in Israel, the seeds have been planted over the last decade. To exploit this tool fully, a generation of skilled mediators in these policy areas needs to be trained and nurtured, and a body of carefully documented cases needs to be developed to serve as precedents and provide guidance.

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