Environmental Impact Assessment and Mediation

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Abstract

During the last years it became more and more difficult to deal with environmental conflicts using traditional political instruments in industrialized countries. One reason for the occurring problems might be the citizens' awareness of scarceness of nature. Another reason might be the changing legislation with the introduction of the environmental impact assessment (EIA) as an integral part of a project's licensing procedure. The EIA offers new possibilities for citizens to interfere in decision processes and to obstruct projects. The changing situation requires new instruments for conflict solving. Mediation may be considered an alternative or completion to the traditional political instruments. It is a systematic strategy for conflict treatment and, with the support of an independent mediator, allows to reach an agreement among all parties involved.

Mediation may be introduced in the EIA. One possibility offers the scoping date, which, if the participation of the public is assured, might avoid heavy disputes in the further process. Another connection between the instrument of mediation and the EIA could be the use of the environmental impact study (EIS) as information background for a mediation process. EIA would then be source of information about all environmental aspects. Thus the role of EIA would be extended to being a part of conflict analysis in the alternative dispute resolution process.

keywords : environmental disputes, environmental impact assessment, mediation, alternative dispute resolution

I. Introduction

During the last years it became more and more difficult in industrialized countries to deal with environmental conflicts. The social, political and economic costs of using traditional political instruments increased. Examples could be the construction of highways, industrial parks or incineration plants, which were delayed for years because of citizens' protest.

One reason for this development might be the peoples' awareness of scarceness of nature.

Another reason might be the changing legislation and as one important aspect the introduction of the environmental impact assessment (EIA) as an integral part of a project's licensing procedure. The EIA offers new possibilites for citizens to interfere in decision processes and to obstruct projects.

In the planning and approval procedure exist different possibilities to raise objections and they are used by citizens. The result is a long lasting litigation procedure with none of the involved parties getting really satisfied. The decisions on these interventions take a long time, cost a lot of money and leave hehind many disappointed, suspicious citizens.

This situation makes it necessary to look for alternatives in resolving environmental disputes out of court. At the same time it creates an openness towards unconventional instruments and encourages a willingness to take new approaches in dealing with environmental disputes among citizens, the implementing company and administration.[10]

Analysing the methods of alternative conflict resolution we discover a long history. Settling disputes by negotiation or bargaining was the principal means in ancient China, based on the Confucian beliefs. It is still practiced for example through the institution of people's conciliation cmmittees.

The out of court solution for conflicts has also a long history in Japanese society. Conciliation and mediation was and still is the normal way to solve disputes, even environmental ones.[3]

In almost all the cultures of the world mediation or other negotiation methods were known and used to solve disputes. When cultures and countries started to get organized as administered states, the administration took over the function of mediation or conciliation by laws and litigation.

Now the ancient forms of solving problems are brought up for discussion again. Since about twenty years divorce disputes, neighbourhood problems and even public disputes are solved by mediation methods in the United States, Canada and Japan. In Germany the movement towards alternative dispute resolution methods started about five years ago. Divorces and also some environmental disputes have been mediated. Conflict solving by negotiation in Germany is in discussion in connection with the EIA and other formal procedures.[2]

It is no coincidence, that the development of cooperative procedures and contents of decision making occurred together with the implementation of the EIA in the American environmental law.

The facilitation of challenge against this assessment caused a dramatic increase of juridical procedures. The power of threat and bargaining of the public was enlarged considerably. A similar development took place in the environmental law of Germany. Since citizens have the power to interfere they should be involved in negotiations with the project carrier and the administration.[4]

A similar development has to be expected in other democratic countries.

II. Characteristics of Mediation

1. Conditions

Mediation is one of the instruments for alternative dispute resolution. It may be defined as a process in which the participants systematically isolate disputed issues in order to develop options, consider alternatives and reach an agreement to accommodate everyones needs. The process is guided by an independent mediator.

For projects with considerable public interest mediation seems to be the appropriate alternative dispute resolution method, since a good mediator, once he or she is found, can assure a democratic and fair procedure.

There are some basic conditions which should be realized to make mediation possible:

- The political system must be a democratic one.
- There has to be a dispute possible to be solved.
- All groups or persons affected by the decision are interested to search together for a dispute solution.
- The dispute focuses not on ethic principles or believes (like atomic power).
- An independent, competent and accepted mediator must be available.
- There must be a willingness to follow the procedure of the conflict resolution method.
- There must be a scope to develop different options.
- There must be enough time, space and money available to assure the same information background for all participants.
- All groups involved have a similar bargaining power.
- The implementation of results must be binding for all parties.[12]

According to its philosophy mediation is only successful, if a win-win situation is possible. (Figure 1 and 2)[9] The outcome has to be mutually agreed to by the participants and each party has to reach a final result better than the position it started with. A negotiation ending with a zero-sum result would not satisfy all participants.[9]

2. The mediator

The process has to be guided by an independent mediator, accepted by all parties involved. He has no authority to impose a settlement. His orher strength lies in the ability to assist the parties in resolving their own disagreements.

The mediators' functions are

- to be the catalyst for the discussions, keeping parties staying with and going on in the process.
- to be the facilitator, arranging the technical and organisational frame, so the consensus oriented negotiation may be supported and facilitated.
- to give advices in process and technical knowledge as an educator, depending on the

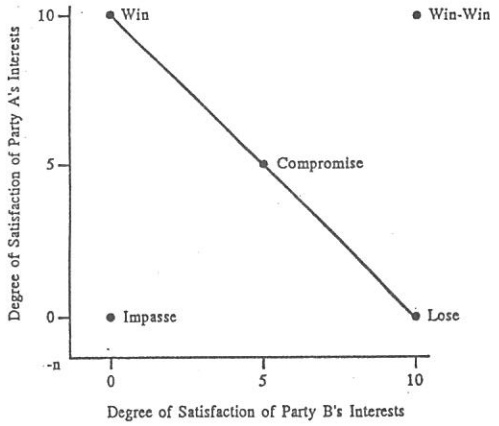

Figure 1. Possible Outcomes of a Dispute as Viewed by Party A

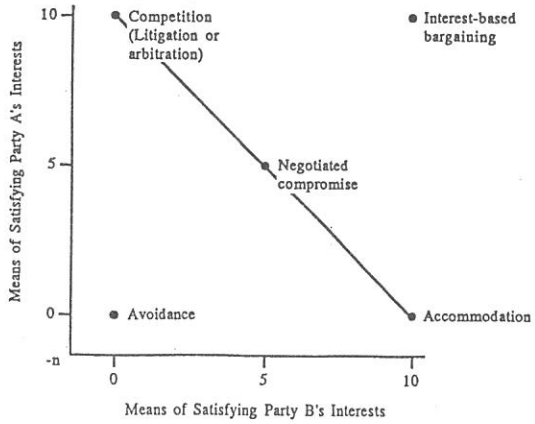

Figure 2. Conflict Strategies as Viewed by Party A

former experiences of the participants.
- and finally to find new alternatives and to integrate different interests.

3. The Phases of Mediation

It is possible to identify different phases or periods in the mediation process.

Phase of Initiating

This first period is mainly important in those countries where the mediation method is still new.

There has to be an initiator of a mediation process. In the USA initiators are mostly offices or environmental funds and organizations. The initiator has to characterize and analyse the problem as far as it is necessary to convince the involved parties of the advantages of a mediation process. Another condition to start up the process is to find a mediator, and as soon as these basic agreements are settled the financial part of the process has to be cleared.

Phase of Preparation

The interest groups have to nominate representatives for the negotiation meetings. Sometimes the mediator has to support this step, because it is difficult for low organized groups to find a representative of their confidence, who is competent in the subject and in bargaining.

Another part of preparation work is the development of the negotiation ground rules. The mediator can work them out with the round of negotiation or introduce a suggestion. These rules settle the handling with the different negotiation problems. There are many things that have to be clarified before the negotiation can start, like participation in the meetings, access to information, treatment of media, control of the final result, and so on.

The mediator has to get familiar with the ideologies and ideas as well as with the different groups and representatives. He has to carry out an analysis of the conflict before starting the negotiation. The conflict analysis is one of the central parts of mediation (see Figure 3)[4]. It is essential for the mediator to know the groups involved, the details of the conflict and the positions and interests of the different groups.

Phase of negotiation

The basic material for this phase is an overview about groups, positions and interests as a result of the conflict analysis. All members of the negotiation round should have the same information level about the subject of dispute and the procedure of mediation. Any imbalance of information should be settled before starting the negotiation.

Now the areas of agreement and conflict between the different interest groups have to be identified.The mediator must know what each participant wants and what he will not accept under any circumstances.

It should be possible to created various alternatives and possible packages for solutions. At this stage there should be no bargaining but only a kind of brain-storming with the participation of all members. To develop options participants have to concentrate on interests and not on positions. To give an example to differentiate between

I. Involved Parties

1. Which are the most important parties and who are their representatives?
2. Are the negatively touched interests organized in groups?
3. Are the parties willing to reach a consensus solution?
4. Are the parties able and willing to work together?

II. Subject of the Conflict

5. By which aspects is the conflict best characterized? Are there different interests or different values?
6. In which way are the problems to be defined best?
7. Which are the central discussion points?
8. What are the next important discussion points?
9. Is it possible to negotiate about these subjects?
10. What are the central interests of each party?
11. Which interests have the parties in common?
12. Which negotiation positions are taken by the parties?
13. Which options exist for a dispute resolution?

III. Mediation Process

14. What do the parties think about consensus conflict resolution methods?
15. Is a consensus process of help for the parties?
16. Which structural needs will influence the conflict solution?
    (Time frame, financial resources, juridical activities)
17. Which obstacles has the process to overcome?
18. Are there parties with experience in alternative dispute resolutions?
19. How are the chances for a successful process?

Figure 3. Questions for a Conflict Analysis

position and interest: a position would by to object against the highway in front of the door, where as interest concerning this dispute would be to keep up the living standard of the area by avoiding the increase of noise or pollution.

There are two main tasks for the mediator:
-to help the participants to articulate the options they know or want, and
-to develop new options that may be more satisfactory.

Negotiation and decision making is the most important step of the mediation process. In this period there has to be found a resolution of the dispute which fits to all participants. As already mentioned, the task for the participants is to find a solution creating a win-win situation. A party only loosing in the negotiating will not support the result of the process.

Phase of Realisation

It is important to document clearly the participants intentions, their decisions and their future behaviour.

In this phase the power control and responsibility are not entirely in the hands of the participants and the mediator. The conflict, being mediated, must be connected to the society as a

whole. As far as possible, the legal control of the solution should be realized during former periods, but a final review has to be done after the solution settlement. In German legislation the solution of a mediation process would be a private contract between the project carrier and the private or public interest groups. It remains to the administration to prove the project on the formal level. In the United States the litigation already changed towards including mediation results in legal procedures.

Usually the plan or contract between the parties includes the steps and time-table of implementation. An important aspect is the possibility for the participants to control the realization of the contract. Often it also includes an agreement on returning to the mediation method if new problems occur in the project.[3),4)]

Ⅲ. The Connection between EIA and Mediation

As already mentioned, there is a historical connection between the two instruments. The implementation of the EIA in licensing procedures makes the decision making process more complex.

1. The use of mediation in the EIA

One of the steps deciding the quality and acceptance of an EIA is the scoping process. It decides about size and contents of the examination to be carried out. In many cases in Germany the public is invited to participate in the scoping process. This is a first step of avoiding big conflicts. Yet the scoping dates as they are realized often are not very satisfying for the participants. There are some procedural mistakes which might cause these problems:

- It seems as if an agreement already exists between the project carrier and the administration.
- Not all groups involved in the dispute are invited to the scoping date.
- The state of information about the project is not the same in all groups.
- The scoping date is moderated (not mediated) by an inexperienced member of the responsible administration office.
- There is little time for discussion.

Realizing a scoping process with this kind of scoping date might give an overview of the positions about the project planned. It is not the adequate procedure to integrate public interests in a planning process.

Some rules have to be followed to assure that the scoping process takes place with a successful participation of the public:

- An independent and experienced mediator is a first step to improve the procedure. If he knows the positions and interests of groups he might lead the discussion toward the interests.
- The mediated scoping procedure is expected to take more time than the usual one day meeting.
- An intensive discussion should be possible, so the number of participants has to be limited. One of the first tasks for the mediator might be to identify representatives for public groups and interests.
- The result of the scoping must be open at the beginning so the public expertise may get influence on it.
- It should be possible to change or choose the EIA-expert according to the results of scoping.

The advantages of the public participation are:

- The EIA procedure becomes transparent for the public.
- Important contributions might be supplemented by the public.
- A participation in the scoping might reduce the objections in the future licensing procedure.

These effects are the original goals of public participation in the EIA.[1)]

To make the scoping process a success it is necessary to include public interests, and if there is any dissent it is necessary to mediate the meeting.[8)]

2. The role of EIA in the mediation process

Mediating the scoping process of the EIA makes sense, if there is a dissent about the environmental impacts of a project. Most projects have not only an impact on natural environment, but also implications on the social and economic situation of citizens. To find a solution about the scoping in the EIA might be not the only problem. If there are disputes about other impacts as well, mediation process has to be organized on a more general level. The EIA than gets another function.

One of the conditions for a successful mediation procedure is to provide the same amount and quality of information to all members of the mediation round. All parties have the right to contract their own experts. The existence of several expertises might improve the knowledge of the participants, but is might as well confuse them.

Sometimes it is difficult to decide how much technical information is necessary for the negotiation, because the bargaining often leads rather to a political than a technical decision. To avoid a flood of uncoordinated information, the environmental impact study (EIS) could be part of a well organized information system in the mediation process. Even the estimation part of the EIS could be very valuable for the mediation process, since most participants might not have any experience in valuation or comparing environmental impacts. In the United States the EIS is one of the important information sources for the public6). The EIS can offer new starts for problem solving if it is developed with this intention[5].

Another advantage of the EIS as source of information is, that it can offer various alternatives for a object[7].

The conditions for a general acceptance of the EIA as an expertise are:

- The EIA expert has to be accepted by all.
- The examination frame has to be settled within an agreement.
- The study itself has to be understood and proved by all members.

The use of this official instrument for mediation can make the process of approval for a project faster and therefore also cheaper. The same procedure might be used for dissents in economic and social aspects by introducing an social impact assessment.

Ⅳ. Outlook

Experiences show, that it might be insufficient to introduce new laws into the approval procedures for projects. There is a tendency of resistance in the public of industrialized and maybe also in industrializing countries, which has to be respected and integrated in the decision making procedures. The EIA is one of the instruments which changed the legal basis without changing the principals of decision making by litigation. Big projects with economic social and environmental impacts will not be accepted by the public as long as it is not involved in the decision making process.

The alternative dispute resolution methods like mediation also provide their problematic sides. It is difficult to get all involved groups around one table for negotiations. It is difficult to provide the financial and informative resources for all participants and to make sure that all groups take part in the negotiation with the same power and skills, so none of the interests gets lost.

New forms of dispute resolution in environmental conflicts are not introduced with the aim to supplement the traditional instruments but to complet them. In Germany there is still very little experience with the mediation method in environmental disputes, but some of the processes going on seem to be successful. So the connection between litigation and mediation, for example in the EIA procedure, may be a future subject for research. It might as well be an alternative to the recently occurring tendencies to cut off the publics rights by shortening the procedures of licensing.

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