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ENCOURAGING PUBLIC ENTITIES TO SETTLE ENVIRONMENTAL DISPUTES THROUGH MEDIATION IN ITALY

THEORETICAL ANALYSIS, PRACTICAL EVIDENCES, POSSIBLE SOLUTIONS

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INDEX

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4. CONCLUSIONS AND PROPOSED SOLUTIONS

a. Amendments to the Law Decree 28/2010

b. Regulation proposal

c. Proposal of mediation clause in PPP and public work contracts.

INTRODUCTION

How to properly manage environmental conflicts?

Being able to adequately settle those type of conflicts is fundamental for the functioning of our society and the preservation of the ecosystem for us and for the future generations. How to strike a proper balance between private interest and public needs, between environmental boundaries and economic growth, between citizens' wellbeing and the growth of big industries? It is so puzzling that environmental conflicts arisen from failed balance of interests are now a daily subject. Environmental issues are becoming more complex and frequent and their magnitude and degree of reversibility often generate a sense of helplessness.

Participatory planning, stakeholder engagement, transparency, precaution, access to justice and prevention are all principles related intrinsically with the environment itself; in fact, they are the core principles of the Aarhus convention[2]. Nevertheless, we are not yet achieving those goals to protect the environment, overall in cases of emergency and conflict, where very few tools are at the disposal of the citizens and not all of them are efficient. In fact, recently, the Aarhus Convention Compliance Committee ruled on 17 March 2017 (case ACCC/C/2008/32) that the EU was not fulfilling its obligations in view of the very limited possibilities for NGOs and the public to have access to justice in the EU.

[2] United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, Aarhus, 1998 (Aarhus Convention 1998).

As it will be exposed above, in case of conflicts linked to the environment, those principles are less likely to be respected, for many different reasons, including the lack of proper ad adequate tools.

Many tools already exist (primarily civil reparation, criminal actions and market-based tools) to contrast them, but most of them are just partially efficient and our laws are scattered of gaps and loopholes[3]. This is the result of a world running on two different speeds, especially in Italy, where the institutions and the bureaucracy are archaic, but the commercial and social spheres are evolving at an increasing rate. In other words, institutional tools are not evolving fast enough to face new harsh and complex environmental issues. The outcome is often a bad management of environmental risk, a lack of timely restoration and a loss of resources, those being both of natural stock and economical means.

Beside the traditional instruments offered by our judicial system, different ones have been developed over the years, as, for example, Alternative Dispute Resolution tools (ADRs) that include mediation. Is mediation an adequate tool to settle environmental conflicts? To verify it, we conducted a theoretical and empirical analysis, precisely at the Milan Chamber of Arbitration (now on CAM).

To overcome the lack of this instrument in Italy, CAM was the first institution to offer environmental mediation services with a project that started in November 2015. The main objective of the project *La mediazione dei conflitti ambientali*[4] is to extend the

[3] LA SORTE V. C., *La conciliazione obbligatoria e facoltativa, la mediazione nelle controversie ambientale*, Padova, 2016; Various Authors, *La mediazione dei conflitti ambientali: linee guida operative e testimonianze degli esperti*, CAM, Milano, 2016; ROSSI C., *La disciplina della prevenzione e riparazione del danno ambientale*, (www.tuttoambiente.it); BENACCI E., *Compendio di diritto dell'ambiente*, Edizioni giuridiche Simone, 2016

[4] Various Authors, *La mediazione dei conflitti ambientali: linee guida operative e testimonianze degli esperti*, CAM, Milano, 2016

application of the civil and commercial mediation to environmental conflicts in order to spread a culture of dialogue, transparency participation and engagement also in environmental disputes. After an experimental year, it became an effective tool offered by CAM. Since November 2015, different cases have been brought to CAM, giving us the opportunity to explore, first hand, this tool, its weaknesses and points of strength. Therefore, this paper will consider a) if and why mediation is a suitable tool to settle environmental disputes through empirical and theoretical analysis; and b) if it is possible to embed it in our legal system, where the focus will be the difficulty (and the responsibility) of the Public Administration to partake in the environmental mediation, in order not only to solve environmental challenges, but also to promote transparency and participatory planning.

1. LEGAL FRAMEWORK AND DEFINITIONS

The most common forms of ADR are negotiation, mediation, facilitation, arbitration and conciliation; though, these terms overlap and modify substantially depending on the legal system. Moreover, the term "mediation" can embrace a large number of activities and has no univocal definition. In fact, it can refer to an institutionalized process, as it is set in the USA or to the widespread tribal custom to settle controversies through the wise man or shaman of the village[5].

Mediation, in its most basic and general sense, is the use of a third party to help resolve conflict between two or more parties. This tool has a long history in international relationships, and over time its application has been expanded from only commercial to labour, business, family, and community disputes and recently, to environmental issues.

Environmental mediation is a specific form of mediation that is aimed at resolving conflicts on environmental matters. It is already practiced abroad; in addition to being

[5] MACNAUGHTON A. L. AND MARTIN J. J., *Environmental Dispute Resolution: and Anthology of Practical Solutions*, USA, 2002

embedded in several international agreements[6] (such as the CETA, eventually), it is implemented in many Countries' legal system[7]. The Anglo-Saxon experience is characterized by a traditional network of social participation in environmental issues and forms of direct participation of sufficiently organized citizenship, while in Germany there are proper specialized agencies dedicated to environmental mediation. On the other side, in Canada it's institutionalized and in the United States it is demanded to the Environmental Protection Agency and has been practiced for almost every environmental controversy since the 1970s. The first transnational environmental dispute resolved through mediation dates back to 1973 and concerned the placement of a containment dam on the Snoqualmie River near Seattle, Washington[8]. Since then, in the USA, companies have negotiated with their counterparts, and in most cases it ended in mutual benefit: environmentalists had gained policy improvement; companies had obtained an image return and often an increase in efficiency[9].

As a tool to resolve environmental conflicts, mediation has been deemed really efficient, in the international context, also to manage violent areas and in peace building operations[10]. The United Nations has been implementing it for decades now, witnessing its

[6] For more information c.f.r. SIMOKAT C., *Environmental Mediation Clauses in International Legal Mechanisms*, mediate.com, 2008 https://www.mediate.com/articles/simokatC1.cfm

[7] It is not functional for this research to gather an in-depth comparative analysis of foreign practices on environmental mediation, however, they can be found in the following texts: Dipartimento di Studi Internazionali, Giuridici e storico-politici, Università degli Studi di Milano, *La mediazione ambientale nel diritto europeo e comparato: alcune prime indicazioni*, Milano, 2015. Various Authors, *La mediazione dei conflitti ambientali: linee guida operative e testimonianze degli esperti*, CAM, Milano, 2016, pp. 226-252

[8] NAPIER C. (edited by), *Environmental Conflict Resolution*, London, 1998

[9] MACNAUGHTON A. L. and MARTIN J. J., *Environmental Dispute Resolution: and Anthology of Practical Solutions*, USA, 2002

[10] BUCKLES D., *Cultivating Peace: Conflict and Collaboration in Natural Resources management*, Ottawa, 1999. United States Institute of Peace, Natural resources, Conflict and Conflict Resolution, Washington, 2007.

efficacy in managing natural resources conflicts which are the main cause of violent conflicts and wars in high risk and politically unstable areas of the planet[11].

In other words, it could be generally inferred that environmental mediation sets up a discussion table where all involved parties sit to find an effective and rapid solution that avoids long processes, money waste, and allow both economic activities and the environment to resume their course. Due to its high efficiency in solving environmental disputes, international and European institutions are encouraging the use of this tool.

a. Environmental Mediation at International Level

To understand how environmental mediation figures in International Law, it is necessary to have a qquick look at the International Environmental Law. The international regulation of the environment is not recent, but, since the 1970s, the necessity to protect the environment has grown, becoming one of the most pressing policy issues in the international agenda.[12] The Stockholm Declaration opened the path to the further development of principles of international environmental law. In particular, Principle 21 provides that:

"States have [...] the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their

HUMPHREYS M., *Natural resources, Conflict and Conflict Resolution: Uncovering the Mechanisms*, 2005. UNDPA and UNEP, *Natural Resources and Conflict*: *A Guide for Mediation Practitioners*, 2015.

[11] For more information c.f.r. UN Secretary General, Report of the Secretary General, Strengthening the Role of Mediation in the Peaceful Settlement of Disputes, Conflict Prevention and Resolution, New York, 2012

UN Department of Political Affairs and United Nations Environment Programme, Natural Resources and Conflict: A Guide for Mediation Practitioners, 2015, p.7

[12] Dupuy P.-M. and Viñuales J. E., *International Environmental Law*, Cambridge University Press, 2018

jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction,"

This has been recognised as representing, in effect, a State obligation related to protecting the environment, as the International Court of Justice subsequently recognized as part of international law.[13]

Since the Stockholm declaration, different principles of international environmental law have been developed and recognized.[14] Although it is not recognised yet unanimously as a principle,[15] the sustainable development paradigm would also be comprised in this list. In fact, the International Law Association pointed out seven major principles of international law relating to sustainable development that include 'the duty of States to ensure sustainable use of natural resources', which also reaffirms the principle of sovereignty of States and their consequent responsibility to ensure that no significant damage to the environment is perpetrated within their territory.[16]

[13] International Court or Justice, GabCikovo-Nagymaros Project (Hungary v. Slovakia), Judgment ICJ Reports, 1997 (7) and Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.CJ. Reports 1996, (226)

[14] The sovereignty over natural resources and prohibition of trans-frontier damage, which includes the preventive principle, the principle of co-operation, Environmental Impact Assessment (EIA) in a transboundary context and the polluter pays principle; the principle of common but differentiated responsibilities; the principle of equitable utilization of a shared natural resource; the principle of intergenerational equity.

[15] For more information cfr. Dupuy P.-M. and Viñuales J. E., *International Environmental Law*, Cambridge University Press, 2018 and Barral V., *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, The European Journal of International Law Vol. 23 no. 2, 2012

[16] International Law Association, *Declaration of Principles of International Law Relating to Sustainable Development*, New Delhi, 2002 (New Delhi Declaration)

Moreover, some procedural obligations have developed into or are in process of becoming obligations in international law since the Rio Declaration. These include notice, consultation, access to information, public participation, effective access to judicial and administration redress and remedy, and prior informed consent for some activities. Very important to the aim of this research is the Aarhus Convention[17], where its name is self-explanatory: *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*. All those principles are highly linked to the development of environmental mediation. In fact, over the years, International Environmental Law has been expanded also to improve international security, in fact, as early as 1987, in the report Our Common Future, the World Commission on Environment and Development stated that the concept of security should encompass environmental considerations:

"The first step in creating a more satisfactory basis for managing the interrelationships between security and sustainable development is to broaden our vision. Conflicts may arise not only because of political and military threats to national sovereignty; they may derive also from environmental degradation and the pre-emption of development options."[18]

As a confirmation of this trend, since the 1990s[19], many initiatives have been launched to incorporate the environmental dimension into security policies.[20] Now,

17 United Nations Economic Commission for Europe, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, Aarhus, 1998

18 United Nations World Commission on Environment and Development Report: Our Common Future, 1987, Oxford ch.11, p37

19 Dupuy P.-M. and Viñuales J. E., *International Environmental Law*, Cambridge University Press, 2018

environmental conflicts have emerged as key issues challenging local, regional, national and global governance, throughout the world they are widespread and increasing rapidly.[21]

The link between environmental resilience and conflicts is not new: it made its first appearance as concerns were growing around the protection of natural environment in armed conflicts. The debate around the military or hostile use of techniques for modifying the environment started after the Vietnam War. Therefore, protection of the environment has been increasingly included as an aspect of national and international security and many different branches of national and international policies were born such as environmental peacebuilding.[22] In 2009, UNEP accounted 40 per cent of all intra-state conflicts to the appropriation or control of natural resources. Adding the actual and projected climate change to the economic and population growth increasing levels of global consumption makes the conflicts over scarce resources, degraded environments and the environmental refugees likely to increase. Furthermore, there are considerable differences in the type of conflicts according to where they are located. Least developed countries are more likely to face violent outbreaks around natural resources appropriation. In fact, the global worsening

[20] e.g. An Environment Agenda for Security and Cooperation in south eastern Europe and central asia (ENVSEC), founded in 2002, OSCE, UNDP and UNEP, The European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL) and the United Nations Interagency Framework Team for Preventive Action (FT Team)

[21] Brown Weiss E., *The Evolution of International Environmental Law*, Japanese Yearbook of International Law Vol. 54, 2011, pp. 1-27; Van Jaarsveld Bronkhorst Urmilla Bob S., *Environmental conflicts - Key issues and management implications*, African Journal on Conflict Resolution, Vol 10, 2010, No 2; United States Institute of Peace, *Natural resources, Conflict and Conflict Resolution*, Washington, 2007; United Nations Interagency Framework Team for Preventive Action, *Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflicts*, New York, 2012 and Chasek P. S. et al., *Global environmental policies*, Routledge, New York, 2017

[22] Homer-Dixon T. and Blitt J., *Ecoviolence: Links Among Environment, Population and Security*, Rowman & Littlefield, 1998

of the environment's conditions due to climate change will be particularly acute in lesser developed countries where, because of difficulties to adapt to or mitigate it.[23] On the other hand, developed countries are more likely to face territorial conflicts with private parties and or public administrations over development work.

In order to sustain the lifestyle of a growing population and economy of the developed countries, a large amount of facilities must be constructed such as power plants or waste disposal facilities and the private and economic interests must be balanced with the public good and the environment.

Although environmental conflicts prevention and restoration has became over the years a must, it often remains an ideal rather than a reality. In fact, despite environmental concerns and agendas are increasing and management is being advocated worldwide, current practices are generally scattered, remain regional, sectorial and unsustainable. There is a proliferation of international policies and treaties on the matters, but a clear framework does not emerge nor clear and practical tools are identified.[24]

Finally, recent international agreements can include provisions and general principles on how to manage environmental conflicts. In this context, bilateral investment treaties play a very important role as foreign direct investments are a major source of international development capital, providing for much-needed infrastructure development,

[23] Brown Weiss E., *The Evolution of International Environmental Law*, Japanese Yearbook of International Law Vol. 54, 2011, pp. 1-27

[24] United Nations Interagency Framework Team for Preventive Action, Toolkit and Guidance for Preventing and Managing Land and Natural Resources Conflicts, New York, 2012; Paterson A., Wandering about South Africa's new Protected Areas Regime, SA Public Law, 22 (1), pp. 1–33; and Van Jaarsveld Bronkhorst Urmilla Bob S., *Environmental conflicts - Key issues and management implications*, African Journal on Conflict Resolution, Vol 10, 2010, No 2.

technology transfers, capacity building and more.[25] Therefore, more and more investment treaties present tools to settle environmental conflicts. As an example, the part three of Southern African Development Community Model Bilateral Investment Treaty Template - Rights and Obligations of Investors and State Parties – lists specific obligations for the parties to properly manage environmental and social risks. Growing this demand for a better management of environmental issues, over the years, the ICSID has been settling an increasing number of foreign investment case linked to environmental conflict; emblematic is the case of Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22.

It emerges than, from this very general outlook that there is no specific international provision regarding environmental mediation. Nevertheless, all the above states the stage for its implementation. In fact, Environmental Mediation can appear in international agreement as a tool to settle disputes[26] and is also widely used by the United Nation to adequately settle Natural Resources Conflicts.[27]

b. Environmental Mediation at EU Level

In the US and Canada, environmental mediation not only is a well established tool, part of the wider range of Alternative Dispute Resolution (ADR), but it has also a generally accepted definition and is practiced with a homogeneous pattern. More precisely, the motivations behind alternative remedies have been well explained by the North American

[25] Bernasconi-Osterwalder N. and Johnson L., *International Investment Law and Sustainable Development: Key cases from 2000–2010*, International Institute for sustainable development, 2011

[26] Simokat C., *Environmental Mediation Clauses in International Legal Mechanisms*, mediate.com, 2008 available at:https://www.mediate.com/articles/simokatC1.cfm

[27] United Nations Department of Political Affairs and United Nations Environment Programme (UNDPA and UNEP), *Natural Resources and Conflict: A Guide for Mediation Practitioners*, New York, 2015

doctrine: Value create and save time, expense, stress[28] . This perspective has been then adopted by the European Union, which considers ADRs as means of social pacification and instruments for modernizing the European social model. But, at the same time and in an apparently paradoxical way, ADRs are also seen as instruments of self-realization of the individual and of the choice of freedom, as an expression of the individuals' autonomy. The latter aims to avoid legal disputes since they are obstacles to the fluidity of the market. Thus, ADR would not only reduce the costs deriving from the establishment of the processes, but would also constitute an instrument for the production of wealth and the promotion of collective well-being[29]. For this reason, there are also strong justifications for law policies, which are not only efficiency-oriented: it is not just about deflation of litigations and overcoming the high costs, long delays and archaism of the process; it is but also improving access to justice and widening of the possibilities of citizens' rights protection. It therefore responds to a general need of greater adequacy and specificity in the justice response. Moreover, mediation, by its very nature of sharing information between the stakeholders, constitutes a means of participatory planning and transparency[30] for the public administration. In fact, by mediating directly with the stakeholders involved in the conflict in order to build a shared solution, the public interest is not only safeguarded, but also decided by the directly interested people[31]. According to the EU, public administrations should foster participatory planning and democracy and transparency[32].

[28] RAMAJOLI M., *Strumenti alternativi di risoluzione delle controversie pubblicistiche*, *Diritto Amministrativo* 2014, pag. 1, fasc. 1-2, 01 giugno 2014

[29] POSNER R. A., *The Summary Jury Trial and the other methods of Alternative Dispute Resolution: some cautionary observation, in "The University of Chicago Law Review*" 1986, p.366. SHAVELL S., *Alternative Dispute Resolution: an economic analysis, in "The Journal of Legal Studies*" 1995, p.1

[30] This aspect will be treated more in details further on

[31] Report from the MIT-Harvard Public Disputes Program, COHEN S., Collaborative Approaches to Environmental Decision-Making: A State Agency's Guide to Effective Dialogue and stakeholder Engagement, New England, 2013

Alongside the many favourable voices, critical positions against ADR were not lacking, which essentially feared a sort of dangerous privatization of the jurisdiction, which would not be able to provide sufficient protection for the weak parties of conflicts. "Dispute settlement is viewed as synonymous of compromise, or even of selling out", which supports the powers of force among the parties involved[33]. On this note it must be recalled that ADRs have no pretension of replacing the adjudicative mechanisms, on the contrary they are configured as a different, complementary set of tools. This feature is reinforced by the fact that their employment does not impede the parties from resorting to court at any moment.

In a historical framework such as the current one, where efficiency has become one of the main objectives of legislative reforms, ADRs have a special appeal. For this matter, at European Law level, in 2008, the Directive 52 was issued with the objectives of facilitating access to alternative dispute resolution and promoting mediation that would operate in a balanced relationship with judicial proceedings. It defines this tool as it follows:

a. 'Mediation' means a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator. This process may be initiated by the parties or suggested or ordered by a court or prescribed by the law

[32] The Treaty of Lisbon, in force since December 2009, includes a number of reforms emphasising open-decision making, citizen participation and the role of transparency and good administration in building up the democratic credentials of the European Union (EU). As regards democratic decision-making and transparency in particular, a specific Title in the Treaty on the European Union (TEU) now includes a number of core provisions on democratic principles, applicable in all areas of Union action. Another cornerstone on transparency and stakeholder engagement is the 1998 Aarhus Convention, specifically related to environmental matters.

[33] PAJNO A., *Giustizia amministrativa e crisi economica*, in www.irpa.eu, che richiama a tal fine Cass. Civ., ord. 6 settembre 2010 n. 19051.

of a Member State. It includes mediation conducted by a judge who is not responsible for any judicial proceedings concerning the dispute in question. It excludes attempts made by the court or the judge seised to settle a dispute in the course of judicial proceedings concerning the dispute in question.

b. 'Mediator' means any third person who is asked to conduct a mediation in an effective, impartial and competent way, regardless of the denomination or profession of that third person in the Member State concerned and of the way in which the third person has been appointed or requested to conduct the mediation[34].

The Directive 2008/52/CE provides for specific obligations for Member States to ensure the application of agreements resulting from mediation (art. 6), access to judicial proceedings or arbitration for those parties opting for mediation (art. 8), confidentiality of mediation (art. 7). The regulation foresees these obligations for States just with reference to cross-border disputes, because of the legal basis available to European legislators; but, as mentioned in the preamble of the Directive, nothing should prevent Member States from applying such provisions also to internal mediation processes. It is important to recall that the Mediation Directive was signed and published after the adoption, but before the entry into force, of the Lisbon Treaty, which moved European integration in the area of civil procedural law beyond the market focus. What nevertheless still remains in the relevant provisions of the current Article 81 TFEU is the fact that European law can only regulate judicial cooperation in matters having cross-border implications[35]. The EU views on mediation are therefore clear, and it pushes for a wider implementation of this tool.

[34] EU Directive 2008/52/EC of the EU Parliament and of the Council 21 May 2008 on certain aspects of mediation in civil and commercial matters, Art. 3

[35] EU, Directive 2008/52/EU on certain aspects of mediation in civil and commercial matters: European Implementation Assessment, In-depth Analysis, 2016, Brussels

On the contrary, for what concerns its environmental application, the scenario is more complex. Firstly, the European Union has not yet adopted specific measure to tackle the mediation of environmental conflicts, secondly there are scattered and different practices all over the continent and the legal and semantic definitions can differ widely from Member State to Member State.

Accordingly, being the regulatory frameworks on a national level very diverse, the European Parliament and the Commission set up a EU reference framework that shall facilitate the use of mediation in the environmental field. This purpose is clear in the Decision 1386/2013/EU[36] that establishes the 7th Environment Action Programme (EAP):

Article. 2.1

The 7th Environment Action Programme shall have the following priority objectives:

(d) to maximise the benefits of Union environmental legislation by improving implementation;

Under this objective is then set the obligation to Promote non-judicial dispute resolution as a means of finding amicable and effective solutions for disputes in the environmental field. Despite the opening to the institution of environmental mediation, the European Union has not yet adopted specific provisions: it may adopt binding provisions only in the matters conferred upon it by the Treaties and only, insofar, as its action can better achieve the objectives laid down in the TEU with respect to the action of individual Member States[37].

[36] Decision No 1386/2013/EU of the European Parliament and of the Council on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet'

[37] With regard to procedural civil law, it is important to understand the limited field of responsibilities of the EU, which evolved from intergovernmental cooperation between the Member States (available at the time of the Treaty

It is interesting to note, however, that environmental matters are a competence of the Union competing with the Member States[38]. This means that both the Union and its Member States are required to pursue *a high level of protection and improvement of the quality of the environment*[39]. In other words, States and the Union contribute, each with its own environmental protection legislation.

Ergo, according to the above-mentioned legislation, extra-judicial mediation of disputes in the environmental field can be seen as an element to implement the European environmental goals and pursue transparency in the public good management. Therefore, despite the absence of a specific EU regulation, each Member State shall act in this direction, as it has been suggested several times by the European Union.

c. The Italian legal framework

Although the law regulating the mediation process is recent, this instrument has ancient roots. Since the Roman law, it has been used to settle commercial and civil disputes and it was first mentioned in the Italian Civil Code in 1865[40]. In its history, the Italian Chambers of Commerce have always been the institutions to handle commercial litigations, mainly related to manufacturing activities, with the approach of managing a conflict rather

of Rome) to the standard community method under the area of freedom, security and justice (introduced as a general objective by the Amsterdam Treaty).

[38] TFEU, Art. 4

[39] TEU, art. 3

[40] GIUDICE G.N., GIUSTINIANI C.L., RICCARDI C., *L'attività di mediazione della camera arbitrale di Milano*, in "*Le Opere del Sole 24 Ore*" n.3, 2016

than decision-defining it. This heritage has reached recent times and has been embedded in the Law Decree No. 28/2010[41].

The mitigated mandatory system and the voluntary mediation

Previous normative experiences

In June 2009, the Italian Parliament issued the Law Decree n° 69, which recognized mediation as an option of dispute resolution for civil and commercial disputes. It also granted the Italian government the power to issue a legislative decree on mediation, which resulted in the enactment of the Legislative Decree n° 28 in 2010.

This law has been amended several times over the years, but the Legislative Decree 69/2013[42] , art. 84 introduced the main important and substantial modification, which introduced the obligation to attempt mediation before resorting to court for some specific matters[43]. It is very interesting to note that the Legislative Decree 69/2013 disposes some Urgent provisions for the revival of the economy. Therefore, the introduction of the mandatory attempt of mediation was included in the bigger context of unlocking market actors such as enterprises from tedious civil procedures (known to be really long and costly) in court. In other words, the legislators where trying to slim down the pending civil cases to ease the work of both the economic actors and the courts. This effort was then

[41] D.L. 4 marzo 2010, n. 28, Attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali - Implementation of Article 60 of the Law of June, the 18th 2009, no. 69, on mediation aimed at the conciliation of civil and commercial disputes

[42] D.L. 21 giugno 2013, n. 69 Disposizioni urgenti per il rilancio dell'economia - Urgent provisions for the revival of the economy

[43] According to Article 5, the following cases are subject to mandatory attempt of mediation: tenancy, land rights, partition of property, hereditary succession, leases, loans, rental companies, medical and sanitary malpractice, defamation by the press of other means of advertising, contracts, insurance and banking and finance.

reinforced by the Legislative Decree n°132/2014[44] , which brings the eloquent name of: Eliminazione dell'arretrato e trasferimento in sede arbitrale dei procedimenti civili pendenti - Elimination of the stopped civil cases and transfer of the pending civil procedures to ADR.

The system in vigour is a 'mitigated' mandatory mediation system, where the litigants are only required to sit down with a mediator for a preliminary meeting (first meeting), instead of having to go through, and pay for, a full-blown mediation. During the first meeting, the mediator illustrates the procedure and invites the parties and their lawyers to comment on the possibility of starting the mediation procedure. If any of the parties is not persuaded that mediation has good chances to succeed, they can 'opt-out' from the process at any time and go directly to court. This feature presents many advantages, including to reduce concerns about the litigants' right of access to justice.

Although mediation is regulated by law, the mediation organisms regulate the procedure. However, these regulations must ensure certain rules as they are set forth in Legislative Decree 28/2010. Such considerations include confidentiality, impartiality of the mediator, the length of the mediation and the legal assistance[45].

Another peculiar and relevant aspect of the mediation in Italy is the power of the judges to order litigants to attempt a mediation at any stage of the dispute. Furthermore, the Court may also order sanctions for parties who refuse to attempt mediation in good faith. The judge can condemn a party who declines participation in the mediation process without

[44] D.L. 12 Settembre 2014, N. 132 Eliminazione dell'arretrato e trasferimento in sede arbitrale dei procedimenti civili pendenti - Elimination of the stopped civil cases and transfer to ADR sitting of the pending civil procedures

[45] European Parliament, 'Rebooting' the Mediation Directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU, 2014

a valid justification by ordering that party to make an additional payment, equal to the administrative fee due in the judicial proceeding into the state budget, which would result in this party's fees being doubled.

What is really unique of the Italian legislation is the nature of the reached agreement: a mediated agreement on matters that impose a mandatory attempt is automatically enforceable. When the parties have reached an agreement, it becomes a writ of execution and has the same legal effect of a court judgment.

Besides the specific matters that trigger a mandatory attempt of mediation, it must be underlined that mediation can be recurred on a voluntary base for any type of controversy, which deals with disposable rights. In other words, mediation can be resorted to for any claim and right that can be freely disposed of by the relevant parties. Therefore, this excludes, for example, criminal law, which includes eco-crimes that are processed by the criminal justice system, but applies, for example, to any civil and commercial litigation.

Those mediations are usually referred to as "mediazione volontaria" (now on voluntary mediation) and the rules contained in Legislative Decree 28/2010 extend to them with some exclusions and differences. In voluntary mediations there is no compulsory legal assistance because the links with the process are less stringent and there isn't a list of matters that would delimit its field of intervention. Contrary to the mandatory mediation, the nature of the agreement of the voluntary one has no immediate enforceable value; if wanted, the parties can request it before the competent court. The indemnities due are also different, as a slight increase is foreseen. The total cost remains in any case convenient and advantageous, especially if compared to the judgment's one.

In addition, voluntary mediation can also be extended to contracts, through the introduction of a mediation clause as a commitment by the parties to attempt it in the event of the emergence of particular disputes. The effects on the procedural level would be tangible, allowing the interested party, in the absence of the attempt, to bring the relevant exception to court.

In conclusion, the voluntary mediation, the mandatory mediation or the mediation ordered by the judge are articulated through the same process, it is always configured as a facilitated transaction, aimed at satisfying the interests of the parties, suitable to pursue optimal results in a short time.

It has to be noted that the mandatory attempt was set out for a 4-years experimentation. In fact, the Law Decree 69/2013[46] amended the Law Decree 28/2010 as it follows: Art. 5 1-bis. […] La presente disposizione ha efficacia per i quattro anni successivi alla data della sua entrata in vigore. Al termine di due anni dalla medesima data di entrata in vigore è attivato su iniziativa del Ministero della giustizia il monitoraggio degli esiti di tale sperimentazione.

Art. 5 1-bis. [...] This provision is effective for the four years following the date of its entry into force. At the end of two years from the same date of entry into force, the Ministry of Justice will monitor the results of such experimentation.

This 4-year experimental period of the mitigated mandatory system, at the end of which the senate should decide whether to maintain it or not, is interesting for two main reasons: firstly, it is perfectly in line with the above mentioned European deflationary purposes and, secondly, it provides a monitoring period in which the ministry of justice can check and balance the efficacy of mediation.

In 2015, the ministry of justice drafted the report Misurare la performance dei tribunali nel settore civile - Measuring the civil courts performance[47] to examine the outcomes of the implementation of the mandatory system. According to this report, the

[46] D.L. 21 giugno 2013, n. 69 Disposizioni urgenti per il rilancio dell'economia - Urgent provisions for the revival of the economy

[47] Ministry of Justice, Osservatorio per il monitoraggio degli effetti sull'economia delle riforme della giustizia, Misurare le performance dei tribunali nel settore civile, 26 marzo 2015

results of the experimentation period were positive as a decrease of 15% (almost 8,000 practices) of civil proceedings from 2009 to 31 December 2013 has been recorded, mainly due to the higher resolution of the litigations through mediation. It has been also noted that the fact that mediation is, for some disputes, a compulsory preliminary step over judgment is, at the moment, the only instrument valid to reduce the flow of incoming judgments and to enhance this important out-of-court vehicle. It is important also to bear in mind that the mandatory attempt to mediation does not preclude judicial action; therefore, the parties can resort to it at any time. As it has been observed in the above report, even if the parties can resort to the court, there has been a great increase in the successful settlement through mediation and of its effectiveness: not only controversies were solved at an increasing rate, but, most importantly, they were solved definitively as the cases of appeal after the agreements are really low or almost null[48].

Besides the impact on justice, the mandatory nature is functional also for the dissemination of mediation. To this end, the mentioned above European study[49] has shown that the introduction of compulsory nature can produce positive effects even on voluntary mediations. Accordingly, when mediation was not mandatory (until Law Decree 69/2013), there were no more than two thousand mediations per year. Since the introduction of the mandatory attempt to mediation in September 2013, both mandatory and voluntary mediations are being initiated at a rate of tens of thousands per month.

Given all those positive outcomes, not only the European Union stated in the same report that Italy is a positive model, but the senate decided to confirm the mitigated

[48] Ministry of Justice, Osservatorio per il monitoraggio degli effetti sull'economia delle riforme della giustizia, Misurare le performance dei tribunali nel settore civile, 26 marzo 2015

[49] European Parliament, 'Rebooting' the Mediation Directive: assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU, 2014

mandatory system at the end of the 4-years trial with the approval of the Law Decree 50, in June the 15th, 2017. Therefore, since June 2017[50], the article 5.1 bis has been canceled.

The actual normative

Legislative Decree n. 28/2010 defines mediation and mediator as:

a) mediazione: l'attività, comunque denominata, svolta da un terzo imparziale e finalizzata ad assistere due o più soggetti nella ricerca di un accordo amichevole per la composizione di una controversia, anche con formulazione di una proposta per la risoluzione della stessa;

b) mediatore: la persona o le persone fisiche che, individualmente o collegialmente, svolgono la mediazione rimanendo prive, in ogni caso, del potere di rendere giudizi o decisioni vincolanti per i destinatari del servizio medesimo;

(a) mediation: the activity, however called, carried out by an impartial third party and aimed at assisting two or more persons in seeking a friendly settlement agreement, including by formulating a proposal for the resolution of the dispute;

(b) mediator: the person or individuals who, individually or collegially, mediate and remain in any case without the power to make judgments or binding decisions for the addressees of the service[51];

[50] Conversione in legge, con modificazioni, del decreto legge 24 aprile 2017, n. 50, recante disposizioni urgenti in materia finanziaria, iniziative a favore degli enti territoriali, ulteriori interventi per le zone colpite da eventi sismici e misure per lo sviluppo https://www.camera-arbitrale.it/upload/documenti/centro%20studi%20normativa/stabilizzazione-mediazione-civile-commerciale.pdf

[51] D.L. 4 marzo 2010, n. 28, Attuazione dell'articolo 60 della legge 18 giugno 2009, n. 69, in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali - Implementation of Article 60 of the Law of June, the 18th 2009, no. 69, on mediation aimed at the conciliation of civil and commercial disputes, Art. 1.1.

The field of action in which the CAM decided to activate the environmental mediation is the voluntary one, following the frame set up for the commercial and civil mediation in the Law Decree 28/2010[52]. Thus, the cases submitted to CAM deal with disposable rights.

As it has been previously exposed, mediation is considered promising in the resolution of transnational disputes and in other national systems, environmental mediation is increasingly considered an important supplement to litigation. It might also be considered an important resource when parties cannot resolve their disputes in court because of the lack of environmental laws on which litigation can be based or because of the lack of political and judicial competence to enforce existing laws. In these settings, environmental disputants must rely almost exclusively on voluntary agreements and negotiated transactions. Besides those situations, in the event of a conflict of any kind, the classical recourse to the legal order is generally limited to the determination of the tort or the reason by the court without providing concrete and practical solutions to the problems[53]. In the environmental field, the need for rapid action to limit or restore any damage makes the purely legal procedures unsuitable to meet the needs for a prompt response. For example, if a land has been polluted, it is very likely that the court will slow down, if not impede, the reclamation process; and then, the court will determine who is the wrongdoer and impose fines or imprisonment, but the major need for the environment is its restoration.

Environmental Law Premises - the admissibility

[52] According to the preparatory research conducted before the experimental phase of the project, the scholars concluded that, on paper, nothing obstruct the application of the LD 28/2010. C.f.r.: La mediazione dei conflitti ambientali: linee guida operative e testimonianze degli esperti. For further information see SPINA G., *La mediazione delle controversie ambientali, in "Ambiente & sviluppo"*, n. 5/2013, Ipsoa. Spina drafts a very clear legal framework.

[53] This aspect will be in-depth investigated in the following chapters, as it has been observed on the field.

According to environmental law, the environment is a public good, considered the public nature of environmental matters non suitable for ADR tools. But as it will be exposed, such evidence is not sufficient to exclude, a priori, the possibility of resorting to mediation, since environmental conflicts have a special characteristic (as it will be analysed in the next chapter) according to the type of damage (caused as a result of detrimental conduct towards the environment) and to the accountable subject for the compensation.

For greater clarity it is useful to dwell on the juridical definition of environment and environmental damage. In Italian legislation, it can be observed that there is no normative provision that explicitly and incontrovertibly indicates a juridical notion of "environment". Not even the Environmental Code[54] provides a univocal definition[55]. Nevertheless, the interventions of the doctrine and of the jurisprudence can help to close the gap. In fact, there are numerous judgments of the Consulta and of the Supreme Court, which prove to be useful and decisive in defining the context. Some, which follow here, deserve, albeit briefly, attention.

Constitutional Court, December the 17th, 1987, n. 641 - The environment is a "unitary intangible asset" made up of various components each of which, on the whole or separately considered, can form "object of care and protection"[56].

Civil Cassation, April the 9th, 1992, n. 4362 - The environment is a whole that, although comprising various goods or values such as flora, fauna, soil, water, etc., "is distinguished ontologically from these and is identified in a reality, without any material consistency, but expressive of an autonomous value which is as well collective and

[54] D. L. 3 aprile 2006, n. 152 Norme in materia ambientale - Environmental regulation (TUA)

[55] BENACCI E., *Compendio di diritto dell'ambiente*, Edizioni giuridiche Simone, 2016

[56] L'ambiente è un "bene immateriale unitario" costituito da diverse componenti ciascuna delle quali, isolatamente o separatamente considerata, può formare "oggetto di cura e di tutela".

constitutive. Therefore, the environment is a specific object of protection by the legal system[57] ".

Criminal Court, Section III, March the 10th, 1993, No. 513 - "Environment means the context of natural resources and of the very significant works of man protected by the [legal] order because their conservation is considered fundamental for the full development of the person. The environment is a notion that is not only unitary but also general, including natural and cultural resources[58]".

In accordance with the jurisprudence, the dominant doctrine also embraces a univocal and generalized definition, identifying, in the object in question, three fundamental components. Precisely, the environment is taken into consideration as:

- Landscape (conservation protection, Article 9 of the Constitution);
- Soil, air, water, etc. (protection from aggressive factors);
- territory (protection of human settlements and of the quality of life - urban planning legislation)[59].

Having said this, one point is unequivocal: the environment is a common good composed by different elements related to each other. Thus, the environment is a unitary

[57] L'ambiente è un insieme che pur comprendendo vari beni o valori quali flora, fauna, suolo, acqua, etc., "*si distingue ontologicamente da questi e si identifica in una realtà, priva di consistenza materiale, ma espressiva di un autonomo valore collettivo costituente, come tale, specifico oggetto di tutela da parte dell'ordinamento*".

[58] "Per "Ambiente" deve intendersi il contesto delle risorse naturali e delle stesse opere più significative dell'uomo protette dall'ordinamento [giuridico] perché la loro conservazione è ritenuta fondamentale per il pieno sviluppo della persona. L'ambiente è una nozione, oltre che unitaria, anche generale, comprensiva delle risorse naturali e culturali."

[59] BENACCI E., *Compendio di diritto dell'ambiente*, Edizioni giuridiche Simone, 2016

and economic good that is legally protected by the environmental law. The question whether it can be or not considered a disposable right, in order to be suitable for ADR, may seem the crucial point, but it is so only on a theoretical level. In fact, it is more viable to move the analysis to a concrete level with peculiar attention to the main European and Italian objective exposed previously: environmental restoration.

The experience of conciliation in labour disputes shows that where there is a precise choice of the legislator, conciliation is always possible, regardless of the available or unavailable nature of the disputed right. And even in the tax reports, the judicial conciliation for the total or partial definition of the dispute has been institutionalized, with the consequence that, even in this case, the profile of substantial unavailability is reduced[60]. It is therefore possible to state that the notion of non-disposable rights is historically and legally relative[61].

It should be noted that actions for compensation related to environmental damages are recognized in our legal system, which attributes to both public and private subjects the legitimacy to defend the environment in Courts. In parallel, mediation could be configured as an instrument to be used in order to protect the environment as a public good. It is precisely the Supreme Court that underlines the validity of this assumption, recognizing to the regions and to the local public bodies the possibility to act in court under art. 2043 of the civil code to obtain compensation for the "further and concrete" pecuniary damage suffered as a result of a conduct that is harmless to the environment.

The position of private individuals remains to be assessed. In this regard, individual citizens have the power to activate an ADR procedure. On the assumption that many issues, despite being related to environmental matrices (smoke, noise, etc.) are still "disputes

[60] Comoglio L.P., FERRI C., TARUFFO M., *Lezioni sul processo civile,* Bologna, 1995

[61] RAMAJOLI M., *Strumenti alternativi di risoluzione delle controversie pubblicistiche, in "Diritto Amministrativo*" 2014, fasc. 1-2, p. 1

concerning available rights and which remain distinct from those related to the guarantee of environmental resources and their collective uses[62] ".

It can therefore be concluded that mediation finds application in the field of environmental issues of a civil nature to the extent that Italian disputes between private law subjects or public subjects (which do not act in the exercise of their authoritative power, but rather, iure privatorum) and on subjective rights.

In the hypothesis of illicit environmental alteration, the carrying out of a mediation procedure (at the request of a party) could be fruitful in order to negotiate:

- how to restore the status of the places;
- compensation for the so called provisional losses;
- and possibly compensation for non-pecuniary damage due to the constitutional importance of the institution.

2. THE IMPORTANCE OF MEDIATING ENVIRONMENTAL CONFLICTS

In December 2015, CAM launched the environmental mediation project: La mediazione dei conflitti ambientali. After a research phase started the experimental one and due to its success and growth, this service has been established permanently within CAM. During the 15 experimental months, which ended in September 2017, CAM handled 17 mediation cases related to environmental issues. This project has partners and supporters who have submitted environmental disputes to the body. Half of the disputes was submitted by the project's supporters, while the other half came independently. Of the latter group, in

[62] Vv. Aa., *La mediazione dei conflitti ambientali: linee guida operative e testimonianze degli esperti, CAM,* Milano, 2016, p. 213

three cases the parties did not have a real awareness of the "environmental" dimension of the dispute, since the subject matter was not an irreparable environmental damage, but a territorial controversy where the peculiarities were many, not only environmental, but also social and economic.

This first year allowed CAM to observe, first hand, the following characteristics of environmental conflicts and introduced us to the difficulties of mediating environmental conflicts involving the public entities. The parties have almost always participated personally to the mediation, always assisted by their lawyers[63] and the mediator's approach has so far not been particularly different from the handling of "traditional" civil and commercial mediation cases[64]. But first, what is an environmental conflict?

a. Environmental Conflicts and Environmental Damage

An environmental conflict is a particular type of social conflict that has arisen around environmental causes, in fact, the concept of environmental conflict must be considered very broad. The term "environmental", therefore, includes all the cases where an activity determines or may have an impact on the territory, on the environment and on the quality of life (including any damage to the person), understood as "common goods".

Gal Bingham, in her 1985 research, analyses 160 environmental mediation and listed six broad categories within which issues fell into: land use; natural resource management and use of public land; water resources; energy; air quality; and toxic

[63] Environmental mediation is considered a type of voluntary mediation, where the legal assistance is optional.

[64] For more detailed information please see: http://www.mediazioneambiente.it; official website of CAM; DI SALVATORE L., Environmental Mediation: Some Cases, 2017, Greenideas.com; DI SALVATORE L., *Mediazione ambientale: il contributo della Camera di Commercio di Milano;* 2017, Forum Iuris and DI SALVATORE, *One Year of Environmental Mediation at the Milan Chamber of Arbitration*, 2017, Milan Chamber of Arbitration

substances[65]. According to Napier[66], the list would now include climate change, health, food safety, marine stewardship, housing allocation and management, the management of major metropolitan areas and other issues.

More specifically, an environmental conflict occurs when there is a dispute concerning environmental matters having:

- deeds or measures of the administration concerning future decisions regarding the management of the environment and of the territory from which risks may arise or on which the set of preferences and interests of the actors involved may not converge;
- acts of the administration concerning the decisions concerning the management of already existing damage or pollution, caused by private behaviour or by incorrect administrative decisions, including in particular:
- damage to assets related to environmental offenses (including the so-called temporary losses, economically assessable) and related methods of compensation for such damage and restoration of the state of the place;
- non-patrimonial damages (e.g. to the image, moral damage, etc.) connected to environmental offenses;
- pecuniary and non-pecuniary risks, connected to the approval of allegedly illegitimate administrative acts for violation of environmental legislation;

[65] BINGHAM G., *Resolving Environmental Disputes: A Decade of Experience*, Washington, D.C.: Conservation Foundation, 1986.

[66] NAPIER C. (edited by), *Environmental Conflict Resolution*, London, 1998

- personal injury, related to illegal behaviour, committed in violation of environmental protection regulations, and unlawful acts of the p.a. issued in environmental matters

- in general, any violation of the environmental protection legislation contained in the civil code, in the penal code and in the sector legislation (for example: The Testo Unico sull'Ambitente (TUA)[67] and the Codice dei beni culturali e del paesaggio[68]);

- and, in any case, a controversy that arose in the environmental sphere or directly or indirectly linked to the protection of the environment, as understood by the community legislation and the consequent policies[69].

The causes of territorial conflicts are many and often linked to one another: some are attributable to contextual questions, others to specific issues related to the realization of a work, the implementation of an activity or a specific decision-making process. In general, it is possible to point out the emergence of an environmental and territorial conflict to:

1. the level of irreversibility of the work or intervention, intended to create an additional impact on existing environmental pressures;

2. the crisis of forms of representation (formal political representation, representation of specific interests) for which opponents often not only do not feel their interests represented, but in some cases they feel they are

[67] D. L. 3 aprile 2006, n. 152 Norme in materia ambientale - Environmental regulation (TUA)

[68] D. L. 22 gennaio 2004, n. 42 Codice dei beni culturali e del paesaggio - Code of Cultural Heritage and Landscape

[69] Various Authors, *La mediazione dei conflitti ambientali: linee guida operative e testimonianze degli esperti*, CAM, Milano, 2016

opposed to those determined by the relations between political / bureaucratic actors and proponents;

3. the poor culture of co-operation by the proposers, but not only;

4. the willingness to address interventions in a general climate of urgency (and the lack of capacity / aptitude to prevent new emergencies);

5. the inequitable distribution of benefits and costs compared to the realization of an intervention or a work;

6. the public utility character, often contested in its local and national dimension (NIABY syndrome, not in anybody's back yard, in addition to NIMBY, not in my backyard);

7. the Public Administration besieged in multiple roles and therefore subject to conflicts of interest;

8. the difficulty for citizens to interpret current regulations and laws regulating authorization processes;

9. the low transparency of processes with high opacity of programming and authorizing modes for the most impacted works (such as strategic infrastructures);

10. the lack of transparency in decision-making and of stakeholder engagement[70].

[70] Various Authors, *La mediazione dei conflitti ambientali: linee guida operative e testimonianze degli esperti*, CAM, Milano, 2016

For environmental damage, consequently, is intended the public nature conflict, referred to in Articles 300 and 311 of the TUA, but also the compensable one, pursuant to art. 2043 of the Civil Code, possibly suffered by a public or private entity, natural or legal person, due to unlawful conduct and/or illegal acts for violation of environmental protection regulations.

Moreover, the definition of environmental damage is widely dealt with by legal doctrine, both at the Community level with Directive 2004/35/EC and at national sector level with the TUA. Article. 300 of the TUA contains the definition of environmental damage and the integration of community legislation:

È danno ambientale qualsiasi deterioramento significativo e misurabile, diretto o indiretto, di una risorsa naturale o dell'utilità assicurata da quest'ultima.

An environmental damage is any significant and measurable, direct or indirect deterioration of a natural resource or the utility provided by the latter.

In accordance with Directive 2004/35/EC[71], an environmental damage is the deterioration, compared to the original conditions, caused:

a. to the species and natural habitats protected by national and EU Laws [...];

b. to internal waters [...];

c. coastal waters and those included in the territorial sea through the aforementioned actions, even if carried out in international waters […];

[71] EU DIRECTIVE 2004/35/CE OF THE European PARLIAMENT AND OF THE COUNCIL of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage

d. to the land […].

The concept of environmental damage is therefore very wide and includes many sectors (water, soil, air, species, protected habitats) and different sizes (reversible; non-reversible; damage to biodiversity).

Furthermore, it is important to remember that the environment is a natural, common and meritorious asset, and that therefore it constitutes a good of all that must be protected by our authorities. In other words, it is essential not only to protect the environment but also, as previously seen, to restore the damage caused. These two basic actions, however, are not absolutely simple. One of the first reasons is that it is difficult to quantify environmental damage; not only itself (how much damage has been caused to the ecosystem and what impact it will have on future generations), but also on a monetary level (it is very difficult to monetize a destruction of local natural resources for example). At a later time, it is difficult to choose the best option for recovery; or, once the value of the damage has been identified, it might not be clear who bears the costs.

As regards the identification of the responsible parties, the Consolidated Law on environmental matters has implemented the community principle "polluter pays"[72], establishing that the costs necessary for the implementation of environmental prevention and restoration measures are charged, also through the exercise of a specific action for recourse, of the operator responsible for the damaging event. As anticipated in the introduction, however, this contribution is also applicable to damages to assets compensable for subjects other than the Ministry of the environment and the protection of the territory and the sea, pursuant to art. 2043 of the Civil Code, when related to illegal behaviour or illegal administrative acts for violation of environmental protection rules.

[72] FERMEGLIA M., *Chi inquina, ripara: imputazione della responsabilità per danno ambientale e risarcimento dopo la legge europea 2013, in "Responsabilita' Civile e Previdenza"* 2015, fasc. 5, p. 1591

The CDCA – Documentation Centre on Environmental Conflicts developed an Environmental Justice Atlas[73] that can provide an overview of the environmental conflicts in the world. Its is really interesting in order to have a more tangible idea of what kind of conflicts are present not only worldwide, but also, for the purpose of this research, in the Italian territory.

Graph. 1 - Italian Atlas of Environmental conflict

b. Characteristics of environmental conflicts and mediation's answers

[73] http://ejatlas.org/

Environmental conflicts differ widely from other types of conflict as they present many peculiar characteristics. Amongst those, the common denominator of all environmental conflicts is very classic: the possession and use of scarce resources (such as economic, environmental, time, space, etc.); that is, if time, money or the environment were infinite, there would be no need to protect any of these goods. While time and money are limited resources that people can protect or derive depending on the chosen way of life, the environment must be protected so that it does not lose its wealth that allows us and future generations to live and prosper. Beside this imperative paradigm, in order to expose all the characteristics and to verify if they are compatible with the mediation, this subchapter has been divided by arguments, which are the following:

- lack of transparency
- highly localized conflicts;
- technical and scientific complexity and uncertainty;
- multistakeholderism and apparent incompatible interests;
- parties often have asymmetrical resources and power;
- quantification of the damage and the urge to repair;

Lack of transparency

The common denominator of environmental conflicts and, more broadly, of public matters conflicts is the lack of transparency, the lack of communication and the resultant lack of trust in the public administrator or the private entity (allowed by the public administration). Altering a territory or great public works often generates the NIMBY and NIABY syndromes, which can lead to interruption of work (even if of public utility) and, ultimately to territorial conflicts, where the local population opposes public decisions or private development. Besides the utility of the intervention, it is very common that the lack of information, of transparency and of involvement of the local stakeholders engender great

opposition in them[74]. In fact, it is not a casualty the European Union (as stated above) foster transparency and democratic decision-making.

Transparency and participatory planning have had good results when implemented, for example, in France, through Débat Public, and at a minor scale, in the experimental project carried out at CAM. In France, it is common practice that the public administration involves the citizens to participate in the decision processes and the most glaring example of the difference in between involving the stakeholders or not is the high-speed rail line construction between Lyon and Turin, where the French side has already been built and the Italian side became almost a guerrilla warfare region[75]. If lack of transparency and stakeholder engagement is coupled with a lack of trust in the institution (because of the political crisis of the democratic representation) and in the judiciary system (because of the long and bureaucratic processes), as it is the case in Italy, it is almost mathematic that territorial conflicts will arise.

A strategy to reduce or recompose local conflict is represented by the activities of sharing, negotiating and mediating with the actors involved, not just the institutional ones. thanks to the involvement of the actors (stakeholder engagement), the information asymmetries are reduced, the citizens become more aware and responsible for the difficulties faced, creative solutions are identified collectively. Mediation offers the possibility to indentify shared solutions based on effective knowledge acquired through shared information. Those solutions are ore likely to be long lasting and solid than decision defined by an authoritative court[76].

[74] Various Authors, Osservatorio Nimby Forum: 10° edizione 2014/2015, Aris, 2015

[75] NO-TAV movement against High-Speed Train, Val di Susa, Italy - https://ejatlas.org/conflict/no-tav-movement-against-high-speed-train-val-di-susa-italy

[76] BLAIR M. M. Stout L. A., *A Team Production Theory of Corporate Law*, Jstor - 2008, http://www.jstor.org/stable/1073662

Highly localized conflicts

By its very nature, an environmental conflict refers to a place. They are thus strongly localized: they strike the territory that is part of citizen's daily experience. For example, any public work or policy will ultimately become part of an individual's environment for the time he lives in that place. Accordingly, the subjects involved, usually, share the same spaces or territories, for example, the mayor, the citizens or the private company of a small city. As a result, the issue will present geographically related features and neighbouring relationships. Therefore, it is important to find a solution that suit the specific features of that area and that ends the quarrel within it.

As a consequence, more than a definitive solution to the problem, in some cases, it is more realistic and perhaps desirable to aim at building a coexistence method that will allow the continuation of the relationship between the parties also in the future and that will make a contribution to the construction of a community of subjects sharing the same territory.

Through mediation, a third and impartial party, the mediator, facilitates communication between the parties so that they can reach a shared solution, a meeting point that realizes the interests and needs of each party involved. This has great benefits: it maintains relationships, key issues can be identified and discussed, and proposals that can lead to imaginative solutions can be made. Symmetrically, solving these disputes in a non-consensual way may destroy any intention to maintain good relationships, fundamental feature for good businesses. The parties may even agree only on some elements, but not on others or they may agree to disagree on all the points, but communication will be reactivated in order to find a shared solution (that can also mean a mutual agreement on not being anymore related by any matter[77]).

[77] BONDY V., DOYLE M., REID V., *Mediation and Judicial Review - Mind the Research Gap, in "Judical Review*" 2005, pp. 220 ss.

For all those reasons, environmental mediation has also to be considered a place-based intervention or as an opportunity to promote social capital, civic values and care for common goods.

Technical and scientific complexity and uncertainty

Scientific complexity and legal uncertainty[78] are at the heart of any environmental conflicts. Misunderstandings and legal impasses are core features of those situations: not only it is difficult for the non-technician to grasp every scientific detail of an environmental-related problem, but also, as it emerged previously, there are legal gaps and uncertainties in this field.

When it comes to the environment, technical and scientific knowledge is often required to settle a dispute; the purpose of mediation is not to negotiate science, but to allow the proper acquisition of scientific data. The highly technical and entangle nature of the issues dealt with creates the need to make these understandable to all participants in their technical and / or scientific aspects as well. The mediator and the parties will therefore be able to agree on the presence of an expert (or a team of experts) involved in providing technical / scientific data. During the course, the technician is called to answer all the questions that are in the minds of the involved parties. For those reasons, mediation can help ensure that all the parties understand and are aware of what the actual situation is. Moreover, the technical consultancy has no decisive purpose and is not binding, but aims at leading the parties to take informed decisions.

Multistakeholderism and apparent incompatible interests

Environmental conflicts usually involve many parties and interests. Stakeholders in those issues can differ widely for economic status and political power: they can range from citizen's associations to enterprises of any scale and Public Administration of any

[78] GROSSI P. *illustrates comprehensively the administrative law crisis* in www.diritto-amministrativo.org.

level and usually they are many involved in the same controversy. The circulation of information among all stakeholders is a key step in finding an agreement that is actually shared and therefore lasts long and mediation process allows all the stakeholders to partake in the decision-making process.

The ubiquitous accountable factor for environmental conflicts is the imbalance of apparently contrasting interests (deriving from apparently contrasting parties); that is, an imbalance towards one of the three fundamental interests (economic, social and environmental) that permeate any sphere of our lives. In the United States, the often used People, Planet, Profit paradigm illustrates very well how this triad is interdependent and should be applied to any human activity. It is important to balance these interests not only to ensure a better quality of life for the present and a prosperous future for posterity; but also in order to grant the activity in question, the business idea, to thrive for a long time, and anyone who starts a path in the economic market hopes that its business will last over time. Mediating creates a space for confrontation and sharing where to examine future opportunities. By giving space to all the interests at stake, the objective is to rebalance these three pillars.

On the one hand, a mediation process can settle quickly an environmental problem, mitigating its eventual propagation and therefore satisfy a public need. A shared solution can satisfy also the surrounding community and restore the previous lifestyle. On the other hand, it can be useful also from the point of view of the person or entity responsible for the damage, which might be interested in defining the matter quickly, with lower charges and, above all, with less media exposure. Not only a mediation agreement can save the reputation of an activity, but it also follow the new precepts set by international institutions, such as CSR, which push the enterprises to be socially and environmentally responsible and to repair their eventual damages.

The next chapter will focus entirely on the Public Administration's position and interest in environmental mediation, being it the focus of this research.

Parties often have asymmetrical resources and power

Environmental and territorial conflicts arise, among other things, because they create a situation of asymmetry between the beneficiaries and those who bear the costs, precisely, the damage that obviously increases as plant size rises or risk perception. The power imbalance can be perceived as political (public entities having the power to release permits and define strategies), economic (large companies) or number (committee's with many members).

By putting all the parties at a table, mediation gives the opportunity to overcome the power imbalance and helps all the involved parties to express their interests. It is in fact a pillar of mediation to give same time and space to all the parties to express their concerns.

Quantification of the damage and the urge to repair

En environmental damage must be repaired, as it has been exposed above, and the environment generally has to be restored fast, in order not to propagate the damage or to protract the situation of the distress of the community affected by it.

As it has been pointed out previously, this is not an easy process. Coupled with the need for a fast action is the necessity of finding an adequate solution for the territory in question. Resorting to court seems therefore non adequate for 2 main reasons. First, the time of the Italian courts is too slow for an immediate restoration of the ecosystem subject to damage. The results of the Observatory of the ministry of justice[79] suggest that despite the latest data on the performance of the civil courts show a slight improvement in the timing of the proceedings (equal to 5% less per year in the last 5 years) and a good efficiency in the disposal of the first grade gradients, the overall performance of the judicial offices continues still far from international benchmarks. In fact, the average duration of the trial in the first instance is around 2 years and 4 months (844 days), in appeal around 2

[79] Osservatorio per il monitoraggio degli effetti sull'economia delle riforme della giustizia, Misurare la performance dei tribunali nel settore civile, 26 March 2015

years and 11 months (1061 days) and in the Supreme Court around 3 years and 4 months (1222 days), for a total of roughly 9 years in the three levels of judgment.

Secondly, those issues, being mainly rooted in a specific territory, need specific and tailored solutions that are best defined by closer operators (or local stakeholders).

Mediation overcomes those two problems by being a faster procedure (the longest mediations experienced lasted a year) and by involving directly the interested parties in finding the best solution.

There are often conflicting situations that evolve into judicial disputes with unforeseeable outcome, which underlie a lack of communication and lack of confidence. Even though the hostile character might be seen as an obstacle, if interpreted in a right way, looking at the future possibilities, the conflict itself can introduce useful elements, as it enables the emergence and enhancement of widespread knowledge, which can greatly improve the quality of projects and imaginative management models. Therefore, it may allow finding a creative, knowledgeable and informed solution, which is crucial since these conflicts have a very negative impact on three necessary and complementary realities: the local community, the environment and the economic activities. Symmetrically, solving these disputes in a non-consensual may destroy any intention to maintain good relationships, fundamental feature for good businesses and for communities' wellbeing.

Furthermore, it is not about deciding who is wrong or who is right, but about implementing the so called situational justice[80], a justice that concerns the whole many-faceted situation in which the isolated episode that rose to the conflict is inserted. On the search for a wrong and a reason (in the past), the search for a possibility of permanence and

[80] NADER L., *The Direction of Law and the Development of Extra-Judicial Processes in Nation State Societies, in Gulliver P. H., Cross-Examinations. Essays in Memory of Max Gluckman*, Leiden, Brill, 1978

coexistence (in the future) must prevail[81]. This is a cornerstone while dealing with environmental issues. As it has been stressed in this research and considering the contemporary environmental problems, it is obligatory and fundamental to solve rather then prolonging any damage to our eco-system. This is derived not only from the urge to cope with human footprint, but also to ensure future generation's prosperity. It can be then inferred that effective, fast and efficient solutions are needed in the environmental field and with specific reference to issues related to the restoration of environmental damage. To the end mediation allows to:

- Solve environmental problems through concrete solutions that are hardly obtainable – and rarely fast - in judicial offices,
- Obtain solutions more adherent to the peculiarities of the dispute, not imposed by a third party but identified by the parties, involving all the actors
- Satisfy the real interests and needs of all the stakeholders,
- Intervene in a timely and appropriate manner,
- Use an active tool for prevention,
- Achieve these goals with lower costs (and with specific tax incentives) and greater confidentiality,
- Avoid the risk of interruption or suspension of work for economic operators and local authorities, in the case of construction works and / or infrastructures,

[81] RAMAJOLI M., *Strumenti alternativi di risoluzione delle controversie pubblicistiche*, in "Diritto Amministrativo" (1-2), 1-43, 2014

- Improve the image of all the stakeholders and to create consensus,
- Improve relations between the parties and create job opportunities and often new relationships[82].

As a result of the above, it becomes very clear that an alternative justice instrument such as mediation can be expanded to the management of environmental disputes. Their complexity, their facets, and their peculiarities oblige to research ways other than the classic ones of the legal procedure.

All the features that make so heterogeneous environmental conflicts, in turn, make them very suitable to be solved in mediation. This process not only favours the environment itself by promptly responding to the damage caused, but it also helps private and public bodies to better understand the needs of the other actors involved, it maintains neighbourhood relationships and it improves the image of the entities involved.

3. PUBLIC ADMINISTRATIONS IN ENVIRONMENTAL MEDIATION

Following the previous theoretical and practical analysis, mediation represents a good tool for solving environmental conflicts. As it has been exposed above, being the environment a public unitary good, it is protected by public authorities; consequently, public bodies have a great role in environmental proceedings, including mediations on the matter. This tool has many advantages as, for example, it could allow Public Administrations to open paths resulting to be more in line with the EU fostered values such as the engagement of the stakeholders in public choices and identification of public policies, accessibility and transparency. The latter being extremely important in this historical context of crisis of the democracy and of the public forms of representation of the citizens. This notwithstanding, it has also been noted that mediating with public bodies is

[82] Various Authors, *La mediazione dei conflitti ambientali: linee guida operative e testimonianze degli esperti*, CAM, Milano, 2016

complex and demanding for the reasons that have been experienced in practice[83]: admissibility of the mediation as a tool to settle controversies that involve a public entity; personal liability of the public officer; imbalance of power; the delegation of decisional powers (political responsibility) and the lengthening of the mediation.

a. Legislative uncertainty and doctrinal debate

Differences with other administrative means of dispute settlement

The difficulties faced by the Public Administration are fostered by the current Italian administrative law crisis which declines in a crisis of the legislator in dictating efficient rules[84], a crisis in the Public Administration and in particular, a crisis in the administrative procedure[85] and a crisis of administrative justice, on which these previous dual tensions are discharged[86].

To the extent that the public officer's judgment calls to select personal protection following established and tedious procedures rather than resolving conflicts, with a dissatisfaction and an increasing distrust towards him by economic operators and the administration itself, as well as the legislator. This engenders a major estrangement between substantive rights and procedural law. It must be underlined that environmental procedures, such as Environmental Impact Assessment or construction permits, are procedural instruments that affect the substantive right to the environment. Following this

[83] See Chap. III p. 27

[84] DENOZZA F., *Norme efficienti. L'analisi economica delle regole giuridiche*, Milano, 2002.

[85] RAMAJOLI M., *Forme e limiti della tutela giurisdizionale contro il silenzio inadempimento, in "Diritto Amministrativo"*, 2014, p 709

[86] RAMAJOLI M., *Strumenti alternativi di risoluzione delle controversie pubblicistiche, in "Diritto Amministrativo"*, 2014, p. 1

reasoning, an administrative remedy that is non-participative or long lasting in its accomplishment or that obliges to long and tedious judicial process may hinder the right to the environment and wider the gap between the administration and the citizens.

However, the appeal to ADRs necessarily requires a development of its own in administrative law as the problem of their admissibility arises. It is therefore necessary to show that the problem of the admissibility of alternative remedies in administrative law is not a question of limits, but of modalities and criteria. These differences were well known during the long debate, which led to the approval of Law Decree no. 28/2010 and it is certainly not a case if the legislator opted for the solution to limit the scope of application of the new regulation to civil and commercial disputes, bypassing the paragraph that assumed its extension also to disputes involving the Public Administrations[87].

But the instances that then justified that hypothesis are still awaiting replies, entrusting the solution to a subject (the judge) who is obliged to evaluate those interests primarily by using the lens of the law, without being able to enter into the administrative merit of the contested decisions. It is evident, however, that the collective nature of those interests and the implications on a large scale, territorial and temporal (the time of future generations), of their management requires, and in some ways imposes, that meta-judicial instruments are taken into consideration side by side with judicial ones. Suffice it to think, above all, of assessments aimed at identifying a possible convergence point between

[87] The paragraph established that "... Except for different provisions contained in special laws, this law also applies to disputes in which a Public Administration according to art. 1, paragraph 2, of the legislative decree 30 March 2001, n. 165, and subsequent amendments. The conciliation of the dispute by those representing the Public Administration, if favored by a conciliator who carries out his activity within one of the conciliation bodies provided for in this law, does not give rise to administrative liability ". - "... Salvo diverse previsioni contenute in leggi speciali, la presente legge si applica anche alle controversie nelle quali è parte una pubblica amministrazione di cui all'art. 1, comma 2, del decreto legislativo 30 marzo 2001, n. 165, e successive modificazioni. La conciliazione della lite da parte di chi rappresenta la pubblica amministrazione, se favorita da un conciliatore che svolge la propria attività all'interno di uno degli organismi di conciliazione previsti dalla presente legge, non dà luogo a responsabilità amministrativa".

opposing conveniences, the cost / benefit ratio of the abstractly possible solutions for the reclamation of an area or the economic and / or political sustainability of a choice rather than another[88].

The participatory logic, intended to favour shared solutions[89], underlying alternative remedies is very different from that of administrative appeals[90] as traditionally and still currently configured, which instead reflects an authoritarian and rigidly superordinated conception of the Public Administration[91]. Hence, in administrative appeals, as regulated by law, the participatory and consensual logic is absent, which leads to favouring traditional judiciary appeals. But above all, in the ordinary administrative appeals there is no further characteristic feature of the alternative instruments, that is the third neutral party with respect to the interests at stake. Among other things, it is precisely the lack of independence of the deciding administration that has determined the current crisis of administrative appeals. In turn, this crisis has led to the resolution of any kind of conflict through the court, contributing to the more general crisis of the system of comprehensive guarantees offered to the citizen[92].

[88] Various Authors, *La mediazione dei conflitti ambientali: linee guida operative e testimonianze degli esperti,* CAM, Milano, 2016

[89] Principle widely recognized internationally and embedded in the Italian legislation through the Law 241, of August, the 7th, 1990, Nuove norme sul procedimento amministrativo e di diritto di accesso ai documenti amministrativi - New regulations on the administrative procedure and on the right of access to administrative documents

[90] CASETTA E., *Manuale di diritto amministrativo*, Milano, Giuffrè, 2015

[91] MASSERA A., *Strumenti non giurisdizionali contro la pubblica amministrazione: tendenze contemporanee, in Forme e strumenti della tutela nei confronti dei provvedimenti amministrativi nel diritto italiano, comunitario e comparato,* Padova, 2010

[92] RAMAJOLI M., *Strumenti alternativi di risoluzione delle controversie pubblicistiche*, in "Diritto Amministrativo", 2014, p. 1

In addition, even with reference to the latter category of remedies, the advantages in terms of speed, timeliness and simplification of the ADR model are lost due to the different compulsory procedures and degrees that are established by law[93].

The admissibility

According to the current legislation, it is not possible to give a single answer to the question regarding the compatibility between ADR and disputes of which a Public Administration is part. Pursuant to the current law and to an almost consolidated opinion in legal literature, the public controversies cannot be solved through alternative remedies, while the ADR can be used in the case of disputes in which the administration acts through private law[94].

The alternative remedies are much more problematic in the case of disputes more properly under public law, so much so that it has been affirmed that they are "off-limits in our legal system when we discuss disputes over provisions"[95]. The denial of the admissibility of alternative remedies to resolve disputes in the case of public relations is traditionally based on the inadmissibility of alternative remedies in the case of disputes

[93] For more information, C.f.r. CASETTA E., *Manuale di diritto amministrativo, Milano*, Giuffrè, 2015. Or RAMAJOLI M, Strumenti alternativi di risoluzione delle controversie pubblicistiche, in "Diritto Amministrativo", 2014, p. 1. Or TRAVI A., *Lezioni di giustizia amministrativa*, Giappichelli, Torino, 2016

[94] LA SORTE V. C., *La conciliazione obbligatoria e facoltativa, la mediazione nelle controversie ambientale,* Padova, 2016. GIOVANNINI M., *La mediazione delle controversie ambientali*, in Various Authors, *La mediazione dei conflitti ambientali: linee guida operative e testimonianze degli esperti*, CAM, Milano, 2016, p.200

[95] TRAVI A., *Considerazioni critiche sulla tutela dell'affidamento nella giurisprudenza amministrativa, in "Rivista della regolazione dei mercati*", 2016, pp. 6-31.

See also CHIRULLI, P.and STELLA RICHTER P., *voce Transazione* (dir.amm.), in Enc.dir., Milano, 1992, vol. XLIV

relating to non-disposable rights[96]. However, there is no common definition of non-disposable rights[97], the only certain fact is that the same legislation induces not to attribute an excessive weight to the available character of the law as a condition for the recourse to alternative remedies, having the legislator precisely exceeded this limit[98].

In our view, this regulatory closure should not be taken as a postulate. It may be useful to analyse if the reasons on which the closure is based can be overcome or not, and then if there may be openings in the legislation for the introduction of ADR applied to controversies featuring a public party.

One of the biggest hurdles to overcome when talking about environmental mediation is the alleged antagonism between the public interest and the use of a mediation procedure. Yet, there is no conflict: it is precisely the ontological features of negotiated procedures that allow the emergence of those public utility profiles that would otherwise be omitted once the conflict arrives before the judge. In other words, when the authority agrees to the mediation process, it only takes up a function that already belongs to it, that of synthesizing and balancing the different interests of the community. Ultimately, mediation implies the use of a model different from that of the traditional administrative procedure understood as the modus operandi hinged on doing the will of the administration. Abandoning the anachronistic absoluteness means recognizing that the public interest cannot be predetermined, because it must always adapt to the concrete: it lends itself to

[96] This analysis already focused on the admissibility of mediation to deal with environmental conflicts. See p.14

[97] GIOSIS F., *Compromettibilità in arbitri (e transigibilità) delle controversie relative all'esercizio del potere amministrativo,* in "Dir.proc.amm.", 2006, p. 243. DELSIGNORE M., *La compromettibilità in arbitrato nel diritto amministrativo*, Milano, 2007. PERFETTI L., *Sull'arbitrato nelle controversie di cui sia parte l'amministrazione pubblica. La necessaria ricerca dei presupposti teorici e dei profili problematici, in "Aipda*", Annuario 2009, p 209

[98]Some of the matters subjected to mandatory attempt of mediation aforementioned were considered before as non-disposable (e.g. Labour Law)

continuous redefinitions because of its indeterminacy. To strengthen this need for an evolution in the administrative modus operandi is precisely the legislation, in fact, an emblematic administrative reform took place in 1990 through the Law 241 *Nuove norme in materia di procedimento amministrativo e di diritto di accesso ai documenti amministrativi* - New regulations on the administrative procedure and on the right of access to administrative documents. Indeed, this law embedded the principle of transparency and accessibility and it has been draft to evolve the archaic administrative system to specially fit the new needs for efficiency, flexibility and adherence to reality. This Law is decisive as it is a first step towards a change in juridical mentality from the conveyed idea of untouchable and pre-established public good and administrative system to the more dynamic and adherent to reality idea of a democratic and participative building and management of the common good. Moreover, if one of the constant features of the particular discipline applicable to the unavailable law is the invalidity of the agreements between the parties, the introduction of the public agreements pursuant to art. 11 of the Law 241/90 transforms the face of administrative power. The consensual methods of exercising the administrative function have affected the concept of public interest, since the admissibility of an interest regulation agreed with private parties has been recognized.

Following this line of encouraging a more participative administration, a circular was issued by the Public Function Department in 2012[99] precisely on the participation of public administration to mediation procedures stating that the compulsory attempt to mediation for the above-mentioned specific matters applies also to public administration. Albeit being just a start and only related to the compulsory matters, it is a concrete opening and an incisive guideline for the public administrators.

[99] Circolare n. 9/2012, Presidenza de Consiglio, Dipartimento della Funzione Pubblica, Linee guida in materia di mediazione nelle controversie civili e commerciali. Decreto legislativo 4 marzo 2010, n. 28, recante "Attuazione dell'art. 60 della Legge 18 giugno 2009, n.69 in materia di mediazione finalizzata alla conciliazione delle controversie civili e commerciali"

Once it is recognized, thanks to the study of the most attentive doctrine and to the most sensitive and modern jurisprudence, that administrative power is not synonymous with sovereign power, but is always regulated by law; that the public interest cannot be predetermined in an abstract way, but is always the result of a concrete and continuous process of weighting the numerous interests at stake; that the considerations concerning the necessary one-sidedness of the management of the public interest are a priori; that the activity of the Public Administration is not perennial, but must also be subject to the temporal variable, to protect legal certainty and legitimate expectations of individuals, then there are no theoretical obstacles for alternative remedies even in administrative law[100].

At the same time, in the absence of a legitimate norm, the fact that it may be convenient, in the public interest, to handle a dispute in mediation, must be determined case by case: if, on the one hand, administrative power is always regulated by law, even when this is not immediately perceptible, thanks to the principle of reasonableness and proportionality[101] ; and if, on the other hand, every controversy is a crisis of the spontaneous application of substantive law, the ordering point of view should not be the power, nor the subjective situation, nor the public interest, but the normative framework of the concrete story. In other words, the determination case by case depending on the characteristics of the conflict, the interests at stake and the additional opportunities that the use of mediation could potentially offer to resolve the conflict, naturally without prejudice to the right of both parties to take (or continue) the judicial path once the attempt to resolve it out of court has failed. Accordingly, ADR should not be represented as private law actions only, therefore precluded in the case of exercise of administrative power, but, more correctly, they should be conceived as possible ways to differently apply the rules with respect to what was considered by the Public Administration in first instance.

[100] All those conclusions are well founded and illustrated in Villata R., RAMAJOLI M., *Il provvedimento amministrativo,* Torino, 2006, p. 43

[101] TONOLETTI B., *L'accertamento amministrativo*, Padova, 2001

Admitting that the rules can be applied "differently", then, the opinion of the administration means acknowledging that the concrete public interest is able to contain, within itself, even the overcoming of the dispute: the alternative resolution of a dispute is a possible way of pursuing the public interest, which expresses a more equal and consensual relationship between citizen and administration[102].

It must also be considered that tools similar to the mediation process are already being used in disputes that involve the exercise of administrative power. Only that they occur, in a larval, spontaneous, informal way and escape the possibility of detection. In fact, reality shows that the administration makes frequent use of a contract whose causal scheme is in all respects similar to that of the agreement that closes a mediation: it is the transaction contract pursuant to art. 1965 of the Civil Code, frequently used in the context of legal relationships concerning the provision of public powers and faculties. A very good example can be the transaction to resolve environmental conflicts in terms of remediation of polluted sites: by incorporating a practice that has long been established at national and regional level, the Legislator recently introduced the paragraph 6-bis to art. 306 of the TUA[103] and dictated an organic regulation of the transaction within the remediation procedures of sites of national interest[104]. These are cases where it is necessary - or even only cheaper for the competent territorial administration - to parameterise (agreeing) the determination of the amount that the liable party will have to pay as compensation for the amount of costs that the authority should reclaim the polluted area.

[102] CINTIOLI F., *Giudice amministrativo, tecnica e mercato. Poteri tecnici e «giurisdizionalizzazione»*, Milano, 2005. GIOSIS F., *Compromettibilità in arbitri (e transigibilità) delle controversie relative all'esercizio del potere amministrativo*, in "Dir.proc.amm.", 2006, p. 243

[103] D. L. 3 aprile 2006, n. 152 Norme in materia ambientale - Environmental regulation (TUA)

[104] GIOVANNINI M., *La mediazione delle controversie ambientali, in Various Authors, La mediazione dei conflitti ambientali: linee guida operative e testimonianze degli esperti*, CAM, Milano, 2016, p.20

b. Personal liability of the public officers

If the absence of a legitimizing norm does not seem to constitute an insurmountable obstacle to the recognition in general of the administration's right to establish the mediation procedure, there is at least one critical profile which, unaltered, lends itself to negatively influence, on the one hand, the choice to submit to the mediation procedure in concrete terms and, on the other hand, the achievement of a final agreement. As a matter of fact, Public Entities cannot completely disregard established practices, let alone escape from procedural constraints; nor they are supported by some sort of self-exemption from legal and political responsibilities hat weigh on the administration and on the subjects acting in the name and on its behalf. As it has been verified in practice, there is a risk that the public prosecutor of the Court of Auditors or the anti-corruption unit (Anac), suspicious of the choice to proceed with a mediation attempt, activates a proceeding against the subject who chose to participate and, eventually, signed the agreement to ascertain whether the early definition of the dispute possibly caused damage to the Treasury. In fact, given the informal characteristics of the procedure and the negotiated nature of the agreement, there are many margins for pleading that, if the matter were decided at the end of a regular judgment, the obligations agreed upon by the administration and the impact of these products on the public could have been "different". This risk, moreover, is directly proportional to the legal complexity of environmental disputes and the multifaceted nature of the underlying interests. The resulting uncertainty could, therefore, induce the accounting judge to superimpose his conviction (and therefore the ascertainment of responsibility), ex post, on the choice made in good faith by the official.

Although circumscribable only to cases of gross negligence of the official, the disincentive scope of such a scenario is evident, if only for the fact that he/she does not run any risk, nor does he/she suffer any disadvantage on an individual level, when he /she refuses to cooperate actively in the order to reach an agreement. As a result this legal responsibility puts in a very bewildering position (very close to immobility) public administrators. To remedy this, it would be useful to encourage (through the legislation) the administrations to resort to mediation.

c. Imbalance of powers

For a mediation procedure to be established properly, the parties involved must give their consent, that is, to genuinely demonstrate their willingness to submit to the procedure to verify the possibility of agreeing. But the administration, for the reasons and traditions mentioned above, is not always genuinely interested in the early definition of an environmental controversy and indeed, due to the asymmetric nature of the balance of power with the private, is often led to a lack of cooperation or, even, to speculate (more or less consciously) on the duration and costs of the dispute whether it is current or potential.

From this point of view, the administration that does not undergo the mediation procedure more or less consciously accepts the growth of the "external costs" of its action, that is of the costs to which the public meets whenever it disregards the involvement of the interests of the recipients of the action: feeling excluded, these subjects are pushed to adopt strategies of resistance and contrast. On this aspect, the deepest meaning of the mediation used to resolve environmental controversies can be grasped, which becomes an instrument, on the one hand, of inclusion of the actors involved and impacted by environmental administrative decisions and, on the other hand, of ex post legitimation of the exercise of political and administrative power.

It follows that the consent to establish the procedure of mediation, even if closely linked to it, should not focus on the mere extemporaneousness of the single hostile situation but should be considered as a whole, as a sign of a new institutional maturity acquired not in order to pursue the general public interest, but in order to calibrate the consequences of that choice in light of the practical result obtainable at the end of the dispute (duration of the trial, court costs, uselessness of the sentence for different reasons and so on).

As an example, the typical Anglo-Saxon pragmatism decided to overcome the disparity of positions between public and private subjects that mediation, unlike the process, would not be able to rebalance, or the inadequacy of mediation to resolve disputes

in which matters of law would prevail, rather than a mere fact[105]. This was done by relying on the undoubted advantages that mediation also offers in the case of public litigation in terms of improving access to justice. In our legal system this pragmatic realism, which, as seen, is not lacking when discussing labour law disputes or tax law, is instead absent as regards the applicability of alternative remedies to the disputes involving a public party such as the environmental ones.

d. Political responsibility and the mediation lengthening

The consent of the administration in the terms described above does not play a key role only when the mediation procedure is established, but also during its implementation and when the parties formalize the final hypothesis of agreement. Both during the procedure and while stipulating the final agreement, the effectiveness of the administration's input is often hampered by the need to define the margins before which the public official is legitimated to express the will of the authority represented. At first sight, it would seem to be a problem of an exclusively practical nature, linked to the extension of any delegation received from the employee, but this is not the case. Every act of delegation, in fact, presupposes the prior establishment of limits beyond which the delegate cannot go, but this feature of the employment relationship with the Public Administrations constitutes a potential rigidity, which, by itself, is likely to jeopardize the mediation from the beginning. The mediation procedure presupposes a high capacity to make extemporaneous decisions that only the public official with managerial qualifications seems to be able to provide at the moment[106]. In mediation proceedings, all the parties, in other words, must be able to decide according to the temporary contingencies. This aspect seems to conflict with the rigidity of the discipline of the administrative procedure, but, as it has been observed in

[105] RAMAJOLI M., *Strumenti alternativi di risoluzione delle controversie pubblicistiche*, in "Diritto Amministrativo", 2014, p. 1

[106] GIOVANNINI M., *La mediazione delle controversie ambientali*, in Various Authors, *La mediazione dei conflitti ambientali: linee guida operative e testimonianze degli esperti*, CAM, Milano, 2016, p.209

practice, mediation processes involving a public entity can be tailored on the needs. An example was the option of leaving more time between the meetings in order to guarantee the official the necessary time to get all their propositions approved with the direct consequence of lengthening the process.

Closely related to the previous, but relevant for the purposes of stipulation of the final agreement, is the problem of the political responsibility of the public official who commits the administration by adhering to the hypothesis of agreement. As acknowledged practically[107], there is a contrast between the political responsibility and the level of concreteness, which are both inversely proportionated and depending on the hierarchical level of the Public Administration. In concrete, it means, for example, that a mayor of a small town will be closer to the local community and environmental problems, but will have less responsibility (also less money) than a regional officer, who will be more detached to the effective situation, but bearing more political responsibilities. Furthermore, political distress is worsened as public entities are subject to election and political ballots, meaning that entering an agreement that could automatically pass onto the future administrations is generally not desirable for the public administrators as their actions might be subject to revision (and therefore leveraging on their personal liability), overall if the future administration has diametrically opposed political views. This feature is detrimental to long lasting previsions and therefore might impact on the decisions of the single public officer.

Those two features have a great impact on the duration of the mediation. The observable consequences are a) a conspicuous lengthening of the mediation in process in order to give the opportunity to the public officer to submit any decision to the internal meeting of its institution; b) an adjustment of the length of the mediation according to the administrative elections. The latter has been experienced twice at the CAM where in one case the agreement was postponed until the elections (the administrator did not want to take

[107] Case 1, p. 35

responsibility) and in another case the opposite happened: the administrator wanted to close fast in order to take the merits.

In any case, the question calls the interpreter and the operators to an assessment on a case-by-case basis and cannot be solved in general and abstract terms; even the experimentation carried out at CAM, which has succeeded in many cases, highlighted on this point the still present discomfort on the part of the administrations. The hope is that all the authorities involved - the territorial and the government, as well as the control authorities - will soon be able to start a debate aimed at verifying the possibility of putting before the exercise of control powers a practice of dialogue, preventive comparison a damage reparation.

4. CONCLUSIONS AND PROPOSED SOLUTIONS

Although mediation has been proved to be effective to solve environmental conflict and is promoted both at international and regional level, its implementation is being prevented by the apparent incompatibility of the means with the concept of public good. This impasse situation can be overstepped and the provisions considered in this paper could be seen as a possible solution to overcome the motionless position of public administration and, thus, to manage environmental conflict in a more efficient, transparent and participatory way.

Moreover, there are some openings for its extension, legally speaking, to controversies featuring a public party; in fact, fragmented changes have been witnessed in recent years[108]. The administrative sector (in response to tridimensional crisis of the sector)

[108]Analysed previously, but about this tendency also see: CASSESE S., TORCHIA L., *Diritto amministrativo. Una conversazione*, Bologna, 2014. CONSOLO C., *Un d.l. processuale in bianco e nerofumo sullo equivoco della "degiurisdizionalizzazione*", in "Corr. giur." 2014, 1173 ss. De LISE P. per il Consiglio di Stato, Relazione sull'attività della Giustizia amministrativa, Roma, 2011

is evolving from its classical closure towards alternative remedies[109], to the point that the President of the State Council, in his inaugural speech of the 2015 judicial year, tracing the lines of possible changes to the system of administrative justice, suggested that:

> *si potrebbe ... pensare per il futuro all'introduzione, a scopi deflattivi, di rimedi alternativi alla tutela giurisdizionale — le cosiddette a.d.r. (alternative dispute resolution) — in analogia con un indirizzo che Governo e Parlamento hanno già intrapreso in campo civile e commerciale sulla scorta delle direttive europee*
>
> *we could ... think for the future on the introduction, for deflationary purposes, of alternative remedies to judicial protection - the so-called ADR (alternative dispute resolution) - in analogy with a path that Government and Parliament have already undertaken in the civil and commercial field on the basis of European directives*[110]

This opening, very important given its origin, witnesses that something is changing with respect to the past and imposes a reflection on the point.

This general evolution of the Administrative Justice has just recently been reconfirmed and encouraged by the European Parliament. In fact, in its 12 September 2017 resolution, not only it praises (again) Italy for its implementation of the mediation in its legal system, but it also "Calls on the Commission, in its review of the rules, to find

[109] RAMAJOLI M., *Interesse generale e rimedi alternativi pubblicistici*, in "Diritto Processuale Amministrativo" 2015, fasc. 2, p. 481

[110] GIOVANNINI G., *Cerimonia di inaugurazione dell'Anno Giudiziario*, in www.giustizia-amministrativa.it, 2015

solutions in order to extend effectively the scope of mediation also to other civil or administrative matters, where possible[111]"

Due to the novelty of both mediating environmental conflicts[112] and mediating with public entities it would be premature to draft a proposition of an ad hoc law decree on environmental mediation. It is unlikely that such legislation would be accepted as experience shown long period of evaluation and amendments before the consolidation of the Law Decree 28/2010 on civil and commercial mediation. Nonetheless, according to the previous analysis, openings in the current legislation could be exploited in order to encourage public entities to participate in mediation. Hence, in accordance with the recent EU resolution and in accordance with the general principle of transparency and to promote democracy and the participatory management of the public good, we propose three amendments to the actual legislation and a contractual close to be embedded in Public Private Partnership for great public works. All those propositions will remain in the wider frame of the voluntary mediation and be subject to the Law Decree 28/2010.

a. Amendments to the Law Decree 28/2010

The problem of consent to the establishment of the procedure, as is known, also exists in civil and commercial disputes and it is also known that in these disputes the Legislator intervened with mandatory rules that have configured the start of the mediation

[111] European Parliament resolution of 12 September 2017 on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the 'Mediation Directive') (2016/2066(INI))

[112] Despite, in the USA, it has been established since the 80', in Europe, and overall in Italy, Environmental Mediation is a new concept

attempt, as a condition of procedure for the subsequent exercise of judicial action. But it is clear that this solution - regardless of its opportunity in the controversies here considered - is not in any case viable in the absence of an express regulatory intervention.

To remedy this, it could be useful to amend the Law Decree 28/2010 reintroducing the discarded provision:

... Salvo diverse previsioni contenute in leggi speciali, la presente legge si applica anche alle controversie nelle quali è parte una pubblica amministrazione di cui all'art. 1, comma 2, del decreto legislativo 30 marzo 2001, n. 165, e successive modificazioni. La conciliazione della lite da parte di chi rappresenta la pubblica amministrazione, se favorita da un conciliatore che svolge la propria attività all'interno di uno degli organismi di conciliazione previsti dalla presente legge, non dà luogo a responsabilità amministrativa.

... Except for different provisions contained in special laws, this law also applies to disputes in which a Public Administration is part according to art. 1, paragraph 2, of the legislative decree 30 March 2001, n. 165, and subsequent amendments. The conciliation of the dispute by those representing the Public Administration, if favoured by a conciliator who carries out his activity within one of the conciliation bodies provided for by this law, does not give rise to administrative liability.

It is understandable why, at the time of the proposal for this Law Decree, the legislator decided to discard this provision. But now that the outcomes have been examined, it could be important, not only for environmental, but also for the civil and commercial mediations, to reintroduce this provision. In fact, this would give the public administrator more freedom of action, which in conclusion would lead to the proper conduction of mediation procedures.

Another amendment should be produced. Art. 6 of the Law Decree establishes a maximum length of three months. As it has been acknowledged previously, mediating with public subjects lengthens the duration of the mediation. Thus, to the end of facilitating the position of public administrators, this limitation should not apply to controversies that involve a public party.

b. Regulation proposal

The Law n. 162/2014 of conversion of the Legislative Decree n. 132/2014, on assisted negotiation and "special" arbitration, has already introduced specific measures for disputes involving a Public Administration (the presumption of PA's consent to the transfer of the dispute to arbitration; to be assisted in the negotiation procedure by your own Attorney, if any)[113].

It would be appropriate to provide similar arrangements for mediation as well, substituting art. 1 of the quoted law with the sequent wording:

"Nei procedimenti civili pendenti alla data di entrata in vigore del presente decreto, che sono relativi a diritti disponibili o che comportano compensi ambientali, le parti, con richiesta congiunta, possono attivare una mediazione ambientale di fronte ad una Camera Arbitrale o un'altra istituzione che fornisce una regolamentazione specifica per tali procedimenti. Questa facoltà è riservata anche alle amministrazioni pubbliche. Il consenso delle pubbliche amministrazioni a questa procedura è assunto in ogni caso se l'ente pubblico interessato non esprime il proprio dissenso entro trenta giorni dalla richiesta della parte privata "

"In civil proceedings that are pending at the date of entry in force of the present decree, that are related to disposable rights or that involve environmental compensations, the parties, with joint request, are allowed to promote an environmental mediation in front of an Arbitration Chamber or another institution providing a specific regulation for such proceedings.

[113] D.L. 12 Settembre 2014, N. 132 Eliminazione dell'arretrato e trasferimento in sede arbitrale dei procedimenti civili pendenti - Elimination of the stopped civil cases and transfer to ADR sitting of the pending civil procedures

This faculty is reserved also to public administrations. The consent of public administrations to this procedure is assumed in any case, if the interested public body does not express its dissent within thirty days from the request of the private party"

c. Proposal of mediation clause in PPP and public work contracts.[114]

Since the adoption of the Agenda21, in 1992[115], it is a well-established principle that governments alone cannot achieve sustainable development, but requires the active participation of all people. Stakeholder engagement, therefore, has to penetrate any decision or policy made by a public authority. This principle has been, together with transparency, well-adopted and integrated at EU Level. Pursuant to this analysis, the recognition by the legislator of the admissibility of mediation for public disputes satisfies multiple needs: not only those that are on the lines of North American doctrine (rapidity, economy, informality), but also responding needs to a logic of the sector, which allow a more adequate protection of the public and private interests.

In fact, alternative remedies are suitable to meet the growing demand for participation and involvement of individuals in administrative choices and, at the same time, also introduce a new way of protecting the public interest. It is in this that the specificity and added value that alternative remedies can offer to administrative law is contained: from alternative remedies benefits not only the private sector, but also the Public Administration.

Great public works represent the major sector that impacts our ecosystem and our society and to respond to the current need of sustainability and stakeholder engagement is an obligation. Generally, each project is entrusted to private companies through public tender, thus creating Private Public Partnership (PPP). It is historically acknowledged that

[114] VALAGUZZA S. *Sustainable Development in Public Contracts*, Napoli, 2016

[115] United Nations, Agenda 21, UN Conference on Environment and Development, Brazil, in 1992

public major woks (e.g. highways or digs) are sources of endless conflicts with the local population. Italy is not exempted from this mechanism; on the contrary, the country has faced in the last years some[116] of the major environmental conflicts in Europe[117]. It is worth recalling the unfortunately very famous case of the EU project to connect every country by railways in order to promote a fast and ecological way of transportation from any point to any other of Europe. In Italy, it took the name of TAV and it is currently in an impasse situation in the segment Turin-Lyon because of endless tensions in the region. It is important to underline how, on the other side of the Alps, the French government already finished the works with no troubles. The reasons lying under the different outcomes of the two countries have a simple root (beside the heavy problems related to Italian corruption): in France, the government prepared the population for the previous 5 years through Débat Public, carried a proper environmental impact assessment and relied on a participated planning, while in Italy none of those measures were taken and the population felt their rights were being violated and their properties de facto expropriated. In other words, France engaged the local population in the processes while Italy did not. This is just an example of stakeholder engagement, but, being highly meaningful to the Italian ears, it clearly illustrates its importance.

As previously exposed, mediation would be an excellent tool for engaging all the stakeholders in the definition of a conflict. For those reasons, we propose a clause to be embedded in the articles of the Legislative Decree n. 50/2016 on public contracts related to ADRs (205 and ss.) of the sequent wording:

Mediazione

[116] http://www.repubblica.it/argomenti/tav

[117] European Union - Directorate General for Mobility and Transport, Highspeed Europe: a sustainable link between citizens, Luxembourg, 2010

"Tutte le controversie tra le parti di un contratto di appalto, concessione o partenariato pubblico-privato che coinvolgono questioni ambientali potrebbero essere risolte tramite mediazione.

La richiesta di mediare la controversia potrebbe provenire da qualsiasi parte del contratto.

A tal fine, le autorità aggiudicatrici possono inserire nell'invito a presentare offerte e negli schemi contrattuali una clausola che imponga alla società aggiudicatrice la necessità di tentare una mediazione "

Mediation

"All controversy between parties of a contract of procurement, concession or public-private partnership involving environmental issues could be solved thought mediation.

The request to mediate the dispute could come from any party to the contract.

To this end, adjudicating authorities may insert in the invitation to tenders and in the schemes of contract a clause imposing to the awarding company the necessity to attempt a mediation"

Contracts of public works could then contain the sequent provision:

"Le Parti si impegnano a sottoporre tutte le controversie derivanti dall'applicazione del presente contratto o ad esso correlate, relative al risarcimento e ai danni per la riparazione di un danno ambientale, a un mediatore nominato e che agisce secondo il Regolamento redatto dalla Camera Arbitrale di (°)"

"The Parties agree to submit all the controversies deriving from the application of the present contract or related to it, related to compensation and damages to repair an

environmental harm, to a mediator appointed and acting according to the Regulation drafted by the Chamber of Commerce of (°)"

The alternative remedies would thus become an integral part of a legal system intended as a network, animated by a dialogic-procedural logic, in a more participated, more transparent and more informal context.

In this framework, the use of alternative solutions to solve environmental controversies, on the one hand, benefits the private sector, which finds another opportunity, in addition to the administrative procedure, to satisfy its request for participation in administrative decisions, on the other hand, it benefits the Public Administration itself, which can employ another, more consensual way of protecting the public interest. It goes without saying that also the citizen needs are heard.

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WEBSITES

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Centro di Documentazione dei Conflitti Ambientali A - Environmental Justice Atlas http://ejatlas.org/

COP23 - http://www.cop-23.org/

Court of Conciliation and Arbitration - http://www.osce.org/cca

Istituto di Ricerche sulla Pubblica Amministrazione http://www.irpa.eu/

Istituto Superiore per la Protezione e la Ricerca Ambientale - http://www.isprambiente.gov.it/it

Mediazioneambiente - http://www.mediazioneambiente.it/

Mediazione dei conflitti ambientali - https://www.camera-arbitrale.it/it/mediazione/mediazione-dei-conflitti-ambientali.php?id=524

Osservatorio Nazionale sulla Mediaizone Civile - http://osservatoriomediazionecivile.blogspot.it

Remede Eu Project 2007 - http://www.envliability.eu/project.htm

Resolve, http://www.resolv.org/about/index.html

Rivista di Diritto ambientale urbanistico amministrativo penale civile con giurisprudenza massimata sentenze per esteso dottrina - https://www.ambientediritto.it

Stabilizzazione della mediazione - https://www.camera-arbitrale.it/upload/documenti/centro%20studi%20normativa/stabilizzazione-mediazione-civile-commerciale.pdf