A Book Review of Finding Solutions for Environmental Conflicts: Power and Negotiation

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A BOOK REVIEW of
Edward Christie’s
Finding Solutions for Environmental Conflicts:
Power and Negotiation*

Frances Kabat**

Edward Christie’s Finding Solutions For Environmental Conflicts: Power and Negotiation does more than just analyze the processes through which environmental conflicts can be resolved. The text takes its readers through the basic principles of the environmental decision-making process and explains how litigation, in addition to alternative dispute resolution (ADR) techniques such as negotiation, can be used to address environmental problems. What makes Christie’s text unique is that it helps readers to understand the legal system of not only the United States, but of the United Kingdom and Australia as well, providing readers with a broad sense of the interactions of law and environmental decision-making processes in other common law nations.

Christie’s book is written to explain the legal issues and power dynamics behind a wide range of environmental conflicts. The book is written to suit the needs of environmental professionals, lawyers, scientists, engineers, and planners. In fact, this book is helpful because it considers the cross-disciplinary nature of environmental conflicts and provides a problem-solving approach incorporating principles from law, science, and ADR. Christie’s text is extremely helpful for those readers interested in learning more about how legal and ADR processes can be used to resolve environmental conflicts.

In his text, Christie stresses that parties to an environmental conflict may need to rely on several processes to manage and settle

*EDWARD CHRISTIE, FINDING SOLUTIONS FOR ENVIRONMENTAL CONFLICTS: POWER AND NEGOTIATION (Edward Elgar Pub. 2008).

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disputes. While ADR and litigation have been used to end environmental disputes, no single process is necessarily effective by itself. In litigation, judges adjudicate disputes and make binding decisions. However, litigation is not a conflict resolution process because litigation does not address sources of underlying conflict. ADR and negotiation, on the other hand, can offer tailored solutions to resolve conflict between parties, but such solutions do not always have the force of law. Because relying on either litigation or ADR can have its drawbacks, Christie recommends using a BATNA (Best Alternative to Negotiation) analysis to determine the most effective course of action. BATNA analysis allows parties to recognize potential outcomes which may occur if a negotiated agreement is not feasible. This analysis enables parties to understand the strengths or weaknesses of a particular position and can help parties determine which processes can be used to resolve a particular conflict or a particular stage of a conflict.

Christie’s book also undertakes an analysis of the power relationships that underlie complex environmental disputes. In fact, Christie suggests that this analysis should include an examination of the information available to each party. Information conflicts can result from asymmetries in parties’ understanding of scientific data and legal rights. Christie emphasizes that an understanding of the power balance between parties is crucial because this dynamic can affect parties’ ability to effectively participate in conflict.

This comprehensive book does more than just explain how legal systems and ADR can be used to resolve environmental conflicts. While Christie begins his text by explaining current trends in environmental conflict and the decision to litigate or negotiate, he also takes time to explain the principles and concepts underlying environmental decision-making processes in each chapter. Chapter Two provides the reader with an introduction to “Principles and Concepts in Environmental Decision-Making.” This chapter explains the relevance of domestic and international law, scientific/technical facts and theory, policy, and values as they pertain to environmental conflict. Christie details the different aims of litigation, which takes more of a “rights based approach,”
and ADR, which takes more of an “interest-based” approach, to conflict resolution.

Christie especially emphasizes the differences between litigation and ADR with respect to the handling of expert evidence. Christie suggests that cross-examination as used in litigation oversimplifies scientific evidence. Additionally, scientific experts are often selected because they espouse a particular point of view. However, Christie explains that courts have recognized the problems posed by the use of scientific experts and have increasingly turned towards court-appointed experts to reduce confusion and potential bias. Christie also explains methods used outside of the United States to handle expert evidence in litigation. For example, “concurrent evidence,” a process developed by the Federal Court of Australia and used in litigation, features presentations of expert statements and a question and answer session at a “hot tub” panel session. Christie also examines methods for handling expert evidence used in ADR. For instance, expert evidence in ADR is often evaluated with the guidance of a scientific round table of experts. In a scientific round table, experts, with the help of a third-party dispute resolver, undertake a joint fact finding and reach consensus on disputed scientific and technical issues.

Chapter Three, “Constraints to Participation in Public Interest Environmental Conflicts,” analyzes the role of public participation in environmental conflict resolution and explains the role of community stakeholders in the process. This chapter provides a basic introduction to environmental law and public participation mechanisms in the United States, the United Kingdom, and Australia, especially legal rights and opportunities. Christie explains the significance of the Aarhus Convention, which was signed by the United Kingdom. This convention specifically enumerates procedural rights for public participation in environmental matters and has influenced public participation legislation in the United Kingdom. This chapter also analyzes the impact of Freedom of Information Legislation and document exemptions on public participation in the United States, the United Kingdom, and Australia. Christie explains how regulatory mechanisms in the United States and the United Kingdom provide
Chapter Four, “Enforcement of Environmental Laws: Legal Rights, Conflict Resolution, Knowledge Power and Negotiation,” discusses the civil enforcement of environmental laws, especially judicial review and standing requirements in the United States, the United Kingdom, and Australia. The United States has adopted a different approach to judicial review of agency decision-making than Australia and the United Kingdom. Deference to administrative decision-making is a key component of judicial review of agency decision-making in the United States (as exemplified by *Chevron v. Natural Resources Defense Council*, 467 US 837 (1984)). However, both Australia and the United Kingdom employ variations of a “no evidence” rule, in which the court undertakes a merits review and evaluates the evidence used to support a particular administrative decision. This rule is similar in some respects to the “hard look” rule used in the United States, which evaluates whether or not an agency decision was based on all relevant factors. Additionally, while specific requirements for standing vary among the United States, the United Kingdom, and Australia, the right to standing may be granted by a statutory right or a common law right. Furthermore, Christie suggests an understanding of legal rights, especially standing, is also necessary for BANTNA analysis, as it can help parties to decide whether litigation or negotiation would be the better course of action to handle an environmental conflict.

Chapters Five through Nine detail environmental decision-making processes as they apply to current issues such as sustainable development, environmental impact assessment, biotechnology and risk assessment, hazardous chemicals and public health, and biodiversity and threatened species. For example, Chapter Five, “Sustainability and the Environment,” addresses the challenges associated with environmental conflicts over sustainable development. In this chapter, Christie analyzes the unique challenges faced by indigenous groups involved in environmental conflicts relating to sustainable development, especially those involving resource management. According to Christie, both litigation and negotiation can provide venues for resolving conflicts over sustainable development, but litigation
may not be as effective in resolving a sustainable development dispute because a court can only determine the acceptability of a particular action, not the best possible use of a particular resource. Christie advocates that negotiation may be a more effective tool for resolving conflicts regarding sustainable development because it provides parties with the flexibility to evaluate different scenarios which take into consideration past and future issues of concern.

The last chapter in Christie’s book, Chapter Ten, “Managing and Resolving Environmental Conflicts by Negotiation: NIMBY or NIMBI,” explains how ADR processes can be used for resolving environmental conflicts and presents a negotiation-based model for managing and resolving environmental conflicts. Christie discusses and evaluates the use of pre-hearing settlements, litigation, ADR and interest-based negotiation, court-annexed ADR, and non-court annexed ADR processes as methods for resolving environmental conflicts. Specific ADR processes are also described, including early neutral evaluation, facilitative mediation, independent expert appraisal, and evaluative mediation. Christie also presents a series of unifying principles for finding solutions for environmental conflicts through negotiation. These principles include identifying all relevant parties and inviting them to participate as well as using the process of shared responsibility and joint action in finding solutions that will give parties access to available information and provide an understanding of technical and scientific data.

Finally, a model for managing and resolving environmental conflicts by negotiation is presented. The steps of this model include: 1) problem identification and prioritization, 2) an assessment of power-sharing BATNA analysis through the use of early neutral evaluation, 3) conflict assessment through the use of facilitative mediation, 4) conflict management through the use of a scientific round table, 5) conflict resolution using multi-party negotiations and evaluative mediation, and 6) implementation of a negotiated agreement. What makes this model unique is that different ADR processes are used at each stage of the dispute resolution process. For example, early neutral evaluation can be used during the second stage or BATNA analysis as a risk assessment tool to evaluate the validity of party claims or to determine the most effective process for resolving conflict.
Additionally, independent expert appraisal can be used during the fourth stage or scientific round table to help parties evaluate and reach conclusions consistent with reliable and relevant scientific data and opinions. This model, while not applicable in all situations involving environmental conflicts, shows how the skills of ADR professionals and other environmental professionals can help contribute to different aspects of environmental conflict resolution.

Overall, Christie’s text provides readers with a very thorough understanding of the legal and ADR processes which can be used to resolve environmental disputes. Christie introduces readers to key concepts in ADR such as BATNA analysis and explains how this analysis can be applied to shed light on different aspects of the conflict resolution process. This text also provides readers with a strong understanding of legal mechanisms that need to be considered during the conflict resolution process. Christie’s treatment of environmental conflict resolution goes beyond most texts on environmental conflict resolution because he provides readers with an understanding of the legal processes affecting environmental conflict resolution in the United Kingdom and Australia. This perspective helps readers understand the truly global nature of environmental conflict and the different strategies that can be employed to resolve these conflicts.