

The potentials of Mediation in the Settlement of Environmental Disputes

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Abstract:

Mediation, as one of the mechanisms of Alternative Dispute Resolution System, has, of late, emerged as a very viable tool for rendering quick, efficient and harmonious justice. Its relevance in the area of settling environmental dispute needs to be emphasized. An environmental dispute is very different from the ordinary litigation, over which regular court ruling is fraught with too many risks. Court judgment on such dispute with the losing party holding the winning one in contempt, has far reaching negative fall-outs for the environment. Again, such dispute requires special focus, appreciation and expertise, which the regular courts lack. This paves way for a system of environmental dispute resolution wherein the parties sit together and find an amicable, harmonious solution, which can go a long way in preserving the environment. Environmental mediation has picked up in several countries of the world, however in India it is not yet given its due recognition. This article will try to explore the potential relevance and suitability of mediation for the settlement of environmental disputes, with a focus on India. This way it will try to contribute to the growing consciousness of futility of long court battles on environmental disputes. Having said this it should not mean that

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there is any push for substituting court system with mediation, rather the intention is to give mediation the “first try” before going for the litigation.

Key words: Mediation, Facilitated Dialogue, Negotiation, Environmental mediation, Litigation.

“I realized that the true function of a lawyer was to unite parties driven asunder. The lesson was so indelibly burnt into me that a large part of my time during the 20 years of my practice as a lawyer was occupied in bringing about the private compromises of hundreds of cases. I lost nothing thereby - not even money; certainly not my soul.”

M.K.Gandhi²

The idea of mediation is beautifully manifested in this Gandhian quote, the need of which is all the more felt nowadays in a society plagued with numerous conflicts. The traditional adversarial justice system is basically the perpetuation or an offshoot of the medieval mindset wherein the acrimony and bitterness does not end with the litigation. On the contrary, the litigative mind remains surrounded with the idea of re-agitating the issue in the form of appeal, review, revision. The need right now is, what we say, to replace this litigative mindset with mediative mindset. This also hints positively at the evolution of more advanced form of justice system wherein parties invariably look to settle their disputes through facilitated dialogue and negotiation. Mediation boom as experienced in USA, Canada, European Union etc. these days reflects this visible transformation from traditional adversarialism towards a more harmonious, creative, consensus-based justice system. Such a problem-solving approach inherently bears a lot of promise for delivering equitable and harmonious environmental justice more so in

²Mohandas Karamchand Gandhi. 1927. *The Story of my Experiment with Truth*. Ahmedabad: Navajivan Mudranalaya, 85. (In this Gandhian quote, one can easily decipher the Gandhiji's advocacy for settling cases through compromise).

highly diversified countries like India.

I. What is Mediation?

Mediation has a long history in international relations³, and over time the practice has made inroads into other forms of conflict – labour, business, family, and community disputes – and recently into public policy-making, including environmental issues.

Mediation is a distinct form of Alternative Dispute Resolution (ADR), which is consensual, non-adversarial, non-adjudicatory and non-litigative. It is antiquated in its origins, the earliest practice of which could be traced to several ancient civilizations.⁴ It is basically a procedure for resolving conflicts. In it a neutral, impartial facilitator assists two or more negotiating parties to identify matters of concern, develop a better understanding of their situation, and based upon that improved understanding; develop mutually acceptable proposals to resolve those concerns. “Mediation thus embraces the philosophy of democratic decision-making.”⁵

Again mediation is a voluntary and confidential way to resolve disputes without giving the decision-making power to someone else (like a judge). There is party autonomy which signifies that disputants are free to choose the process. They cannot be coerced into accepting mediation as a forum for dispute resolution. Further, confidential nature of the proceedings makes sure that parties discuss frankly all the issues concerning the dispute. Communications exchanged

³ In this connection mediation is more akin to diplomacy. Diplomacy has been invariably attempted at to settle disputes between states before they could resort to war.

⁴As for example in ancient India mediation was ingrained in the Nyaya Panchayat System wherein the dispute would be suitably and amicably settled through intervention of elderly and experienced members of the village.

⁵Laurence Boulle. 1996. *Mediation: Principles, Process and Practice*. 2nd ed. Butterworths, 27.

during mediation are protected so they cannot be divulged without the mutual consent of the parties. A suit for breach of confidentiality may be brought in the court if a party, or for that matter, mediator breaches the promise to keep the communications confidential. Court, however, in exceptional situation like, in the interest of justice may ask for confidential communications/documents for evidentiary purpose.⁶ Finally the mediated settlement agreed upon by parties is reduced to writing in an agreement, which is enforceable at law like a legal contract.

Further, the process is well structured with distinct stages as enumerated below:

1. Mediator Sets the Stage
2. Parties Narrate Their Stories / Mediator Identifies Concerns
3. Mediator Identifies and Frames Issues, and Sets Agenda for Negotiation
4. Mediator Assists in Generating Alternatives
5. Mediator Encourages Parties to Select Alternatives
6. Mediator Assists in Writing the Agreement and Ends the Mediation

Thus mediation involves sitting down with the other side in the dispute with a third party who is neutral and impartial (the mediator). The mediator helps the parties identify the important issues in the dispute and decide how they can resolve it themselves. The mediator does not tell them what to do or make a judgment about who is right and who is wrong.⁷ Control

⁶ Jacqueline Nolan-Haley. 2009. "Mediation Exceptionality." *Fordham Law Review* 78(101). (Mediation confidentiality is a theoretically challenging issues for mediation academicians. One school of thought says that communications forming part of mediation must remain strictly confidential in all circumstances, while other school says that in exceptional situation, bar of mediation confidentiality may be allowed to be lifted by the court in the interest of justice).

⁷ Sriram Panchu. 2011. *Mediation: Practice and Law*. LexisNexis Butterworths Wadhwa, 64-67. (There are two basic models of mediation, one

over the outcome of the case stays with the parties. Mediation incurs minimal procedural and evidentiary requirements while providing unlimited opportunity for the parties to exercise flexibility in communicating their underlying concerns and priorities regarding the dispute. The main attraction of mediation is the prospect of reaching a harmonious solution, while preserving the relationship of the parties as opposed to the confrontational/legalistic approach of traditional litigation.⁸

The benefits of mediation may be summed up as follows:

1. Economical decisions: Mediation is generally less expensive when contrasted to the expense of litigation or other forms of fighting.
2. Quick settlements : In an era when it may take as long as a year to get a court date, and multiple years if a case is appealed, the mediation alternative often provides a more timely way of resolving disputes.
3. Mutually satisfactory outcomes: Parties are generally more satisfied with solutions that have been mutually agreed upon, as opposed to solutions that are imposed by a third party decision-maker.
4. High rate of compliance: Parties who have reached their own agreement in mediation are also generally more likely to follow through and comply with its terms than those whose resolution has been imposed by a third party decision-maker.
5. Greater degree of control and predictability of outcome: Parties who negotiate their own settlements have more

is facilitative and other evaluative. In facilitative mediation, which is practiced more, the mediator simply facilitates the parties in arriving at their decision. He does not impose anything on the parties, nor does he replace parties' decision with the one of his own. Whereas in evaluative mediation, the mediator has a greater say so far as giving his own decision is concerned. He frequently provides direction in which the dispute has to be sorted out. The mediator thus has evaluating power in this model of mediation).

⁸ Christopher W. Moore. 2008. *The Mediation Process: Practical Strategies for Resolving Conflict*. Jossey-Bass, 15.

- control over the outcome of their dispute. Gains and losses are more predictable in a mediated settlement than they would be if a case is arbitrated or adjudicated.
6. Personal empowerment: People who negotiate their own settlements often feel more powerful than those who use surrogate advocates, such as lawyers, to represent them. Mediation negotiations can provide a forum for learning about and exercising personal power or influence.
 7. Preservation of an on-going relationship or termination of a relationship in a more amicable way: Many disputes occur in the context of relationships that will continue over future years. A mediated settlement that addresses all parties' interests can often preserve a working relationship in ways that would not be possible in a win/lose decision-making procedure. Mediation can also make the termination of a relationship more amicable.
 8. Workable and implementable decisions: Parties who mediate their differences are able to attend to the fine details of implementation. Negotiated or mediated agreements can include specially tailored procedures for how the decisions will be carried out. This fact often enhances the likelihood that parties will actually comply with the terms of the settlement.
 9. Agreements that are better than simple compromises or win/lose outcomes: Interest-based mediated negotiations can result in settlements that are more satisfactory to all parties than simple compromise decisions.
 10. Decisions that hold up over time: Mediated settlements tend to hold up over time, and if a later dispute results, the parties are more likely to utilize a cooperative forum of problem-solving to resolve their differences than to pursue an adversarial approach.

II. Mediation in Environmental Disputes

A. Meaning

Environmental mediation can be defined as a dialogue between stakeholders, that is to say, interest groups or individuals concerned over environmental issues (management, valuation, ownership or protection of natural resources, landscapes, species or habitats) in order to produce an agreement satisfactory to all parties, through the intervention of an outside party (mediator) who takes no position on the merits or attempt to influence the outcome, but its function is to facilitate the dialogue.⁹ It basically implies the use of mediation for generating mutually acceptable outcome for a given environmental dispute. Environmental mediation is not just a method of conflict management. It can be implemented when it comes to promoting collaborative projects of land and public property management and the environment, involving the active participation of different interest groups.¹⁰ The mediator's presence, as well as the mediation structure, can encourage the parties to examine their negotiation style and preparations, which in turn leads to changes in attitude and format. Parties are offered an opportunity to explore the interests underlying their stated positions. Attention is paid to opening up clear lines of communication, clarifying issues, and differentiating the substantive differences from what are simply misunderstandings. Outside expertise acceptable to all parties can be made available for any expert opinion.

B. Origin

In comparison to mediation in its generic sense, the narrower field of environmental mediation is of relatively recent history,

⁹ Lawrence S. Bacow and Michael Wheeler. 1984. *Environmental Dispute Resolution*. New York: Plenum Press, 7. (The definition seems very close to facilitative model of mediation).

¹⁰ *Ibid*, 9.

dating back only to the mid 1970's¹¹, and traceable largely to the United States. The first documented case was the celebrated *Snoqualmie River Mediation*.¹² The case was about a controversial dam project on the Snoqualmie River. Its success spurred immense interest and research into the use of mediation for environmental disputes. (This landmark first environmental mediation case will be discussed in detail in the "Revisiting Snoqualmie River Mediation Case" section of this Article).

The origin of environmental mediation was in line with the rapid development of alternative methods of dispute resolution in different sectors of society in the seventies. Since then, environmental mediation has grown in the USA in various fields which includes disputes over water management and natural resources, land use, rail or road, developmental works having adverse environmental implications etc. It has now official legal status in several states of USA.

From the 1980s, environmental mediation spreads in different countries namely, Canada, Australia, Japan, Austria, Netherlands, Germany etc. In the province of Quebec, Canada, it is prerequisite to have public discussions, and if need be, mediation is allowed on any new environmental measures taken up by the government in case of oppositions. This is

¹¹ G.Cormick. 1981. "The Myth, the Reality and the Future of Environmental Mediation in the Land Use Policy Debate in the United States." *Journal of Conflict Resolution* 21: 72.

¹²*Ibid*, 76. (Mediation was first explicitly used to resolve an environmental dispute in 1973 that involved a long-standing conflict over the proposed location of a flood control dam on the Snoqualmie River near Seattle, Washington. Experiments with environmental mediation began in the United States in the mid-1970s, as an extension of techniques that were being used successfully in community disputes. In one of the first test cases, Gerald Cormick and Jane McCarthy of the University of Washington's Environmental Mediation Project were appointed by the governor of Washington State to serve as mediators in a dispute among environmentalists, farmers, developers, and public officials over the damming of the Snoqualmie River. The resulting agreement illustrated one of mediation's main assets — its capacity to generate creative solutions that satisfy the interests of all parties involved).

aimed at generating consensus building and addressing the shortcomings in such measures.¹³ Further, environmental mediation practice is developing in almost all European countries, where it is being considered a part of public participation in environment decision making and has now been accorded a legal basis in some EU countries.¹⁴ In USA, Canada, France, Germany etc., several companies have teams of mediators specializing in environmental conflict management.¹⁵

In India, even though mediation in general has gained importance with the establishment of court-annexed mediation centres in several parts of the country, yet the specific application of it in the area of environmental disputes is still not in vogue. However, the need of public participation in environmental decision making, which is akin to mediation, has, of late, gained considerable significance here in the wake of series of mass movements against arbitrary developmental works carried out by government in the name of development. In this connection, Narmada,¹⁶ Tehri,¹⁷ and very recently Koodunkulum¹⁸ movements are worth mentioning here. In all such environment related disputes, potential role of mediation has been talked about for addressing environmental concerns and issues and for generating outcome accepted to all.

¹³ Meinhard Doelle and A. John Sinclair. 2010. "Mediation in Environmental Assessments in Canada: Unfulfilled Promise?" *Dalhousie Law Journal* 33: 101. Electronic copy available at: <http://ssrn.com/abstract=2155620> (Last accessed on September 10, 2013).

¹⁴ 6th Environment Action Programme of the European Community (2002-2012) adopted on 22nd July 2002, effective use of ADR and mediation in the area of environmental dispute within the EU countries was advocated for. Details available at <http://ec.europa.eu/environment/newprg/index.htm> (Last accessed on September 12, 2013).

¹⁵ Michael Young. "Resolving Environmental Disputes with Environmental Team Mediation: A New Model." Available at <http://www.mediate.com/articles/youngm1.cfm> (Last accessed on September 12, 2013).

¹⁶ *Infra* at 26.

¹⁷ *Infra* at 27.

¹⁸ *Infra* at 30.

C. International Bases

Mediation finds place in several international legal instruments. For understanding its application over environmental disputes, its legal bases can be found in the procedural framework of several international legal instruments like UN charter¹⁹, WTO dispute settlement regime²⁰, UNCLOS,²¹ The Vienna Convention for the Protection of the Ozone Layer (1985),²² Agenda 21,²³ Convention on

¹⁹ Art 5 of the United Nations Charter deals with peaceful settlement of disputes. Article 33 specifically mentions mediation as one of the modes which should be tried first for settling international disputes before going for punitive measures. It is required that countries with disputes that could lead to war to first of all try to seek solutions through peaceful methods such as negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements or other peaceful means of their own choice.

²⁰Article 5 of WTO dispute settlement regime (replaced GATT in 1995) specifically provides for 'mediation' along with 'conciliation' and 'good offices' if the parties to the dispute agree. Although mediation option is not much used within WTO regime, attempts are on to popularize it since WTO dispute settlement procedures especially arbitration are proving to be lengthy, expensive and complex.

²¹Mediation can also be traced under part XV of the United Nations Convention on Law of the Sea, 1982 (UNCLOS). Here part XV deals with settlement of disputes. Article 279 imposes obligation upon state parties to settle disputes by peaceful means. Mediation, being one of the pacific modes, can be employed to generate mediated outcomes provided the parties concerned have agreed thereto.

²²This is a framework treaty allowing for international cooperation to protect the atmospheric ozone layer which was being destroyed by the use of chemical substances like aerosol. Known as Montreal Protocol, (1987), it is generally considered among the most successfully implemented. It is important that in such a document mediation is specifically mentioned as a mode of settlement of disputes. Available at http://ozone.unep.org/new_site/en/montreal_protocol.php (Last accessed on September 15, 2013).

²³Agenda 21 was the final document of the United Nation Conference on Environment and Development (UNCED) held in Brazil in 1992. It is an action plan with 115 specific topics. This document does not create an actual dispute resolution mechanism, but, perhaps more importantly, it suggests the creation of a norm or custom of including mediation among the skills necessary for decision-making. Available at http://www.un.org/esa/dsd/agenda21/res_agenda21_00.shtml (Last accessed on September 15, 2013).

Biodiversity (1992)²⁴ etc. By incorporating mediation in all such instruments, the objective is to give due recognition to the harmonious justice which mediation as a concept envisages. This hints at the growing acceptance of this form of ADR at the global level, giving due recognition that consensual decision making is the better option when it comes to settling environmental disputes. This also signifies that for trans-boundary pollutions or for that matter any international environmental dispute, involving more than two or more countries, mediation should be tried first for settling disputes.²⁵

D. Environmental and Natural Resource Disputes

They are ubiquitous. Everywhere and every day, people compete for scarce resources, including access to clean air and water, oil and gas, minerals, timber, farmland, or to preserve habitat for plants and animals. In competition for these resources, people struggle to resolve issues such as how to balance resource exploitation with the need to preserve air and water quality, how to supply water to arid regions while protecting surface and groundwater supplies, or how to permit

²⁴Convention on Biological Diversity (CBD, 1992). It is a framework treaty which has 3 main objectives: conservation of biological diversity; sustainable use of the components of biological diversity; fair and equitable sharing of the benefits arising out of the utilization of genetic resources. In regards to the settlement of disputes among parties to the Convention, the CBD is concrete in its placement of mediation as a step after negotiation, and if resolution is still not reached, then the dispute will escalate either to arbitration or the International Court of Justice or both. Available at <http://www.cbd.int/convention/articles/?a=cbd-27> (Last accessed on September 16, 2013).

²⁵ In an interesting development, both India and Pakistan have been asked by the expert environmental groups on both sides to go for mediation option for settling Siachin disputes. This was in the backdrop of ecological damage caused to the Siachin glacial due to military activities by both sides there. Expert group opined for UN led mediation to at least find ways and means to cope with growing environmental challenges in the highest battlefield that may pose high risk due to glacial melting, if military activities are not stopped there. "UN Mediation Must to Avoid Environmental Hazards," *Climate Himalaya*, 27 September 2011. Available at

genetic modification of plants and animals while preserving the integrity of naturally evolved species and ecosystems. Each of these issues involves a distinct ‘how’ question that collectively defines the core challenges of “environmentalism.”²⁶ How can we promote the use of our natural resources and technology, while preserving the long-term quality and integrity of those resources on which current and future generations depend? Furthermore, technological and industrial activity has led to the increasing degradation of the natural environment, locally and globally. As a result environmental disputes increasingly arise. Should an area be logged? A dam built? A drain filled? A toxic dump created? These disputes often become violently heated. Witness for example, the on-going raging controversies on the Narmada Dam Construction,²⁷ The Tehri Dam,²⁸ and more recently Lower Subansiri Hydropower Project²⁹, Lavasa³⁰,

<http://chimalaya.org/2011/09/27/un-mediation-must-to-avoid-environmental-hazards/> (Last accessed on September 18, 2013).

²⁶Merriam Webster Dictionary (11th ed. 2003). (It defines environmentalism as an advocacy of the preservation, restoration, or improvement of the natural environment especially the movement to control pollution).

²⁷ Known as the Sardar Sarovar Dam, is a gravity dam on the Narmada River near Navagam, Gujarat, India. The project took form in 1979 as part of a development scheme to increase irrigation and produce hydroelectricity The dam is one of India's most controversial dam projects and its environmental impact and net costs and benefits are widely debated. More details available at <http://www.indiaenvironmentportal.org.in/search/site/narmada> (Last accessed on September 19, 2013).

²⁸ The Tehri Dam (Uttarakhand) has been the object of active protestation by environmental organizations and local people of the region. In addition to the human rights concerns, the project has spurred concerns about the environmental consequences of locating a large dam in the fragile ecosystem of the Himalayan foothills. Government claims that that such a project is necessary for tapping the large potentials of hydro-electricity in the region. Available

at <http://www.indiaenvironmentportal.org.in/search/site/tehri%20dam%20contro>

versy (Last accessed on September 19, 2013).
²⁹ Lower Subansiri Dam Project (located at Assam-Arunachal Pradesh border) is going to be Asia's largest hydropower project. But very recently this project has created a lot of controversies regarding the adverse environmental impacts that it may cause. Of late, the construction work has been put on hold there as there have been violent protests against this project. Central Government says that it will go ahead with this project as it will bring

Koodankulam Nuclear Power Plant³¹ and several similar disputes in Indian states and in other parts of the world. In all such disputes, different stakeholders have different story to tell. Community, individual, Government, environmental rights group, are all at loggerhead with each other. How can, and indeed, how should, such environmental disputes be resolved?

Almost everyone is familiar with the idea of litigation. If we have a legal disagreement with somebody, or some business, industry, or governmental agency, we can bring our dispute to the courts of law. Environmental and public interest group continue to do just that. They often try to prevent certain industrial or governmental activities; and when damages do occur to the natural environment, they try to press their claims in the courts for compensation. There is increasing consensus, however, that litigation has drawbacks in resolving environmental disputes. For example, because litigation is expensive, it is often beyond the financial means of concerned

prosperity to the North-Eastern states. Available at <http://www.indiaenvironmentportal.org.in/search/site/lower%20subansiri> (Last accessed on September 19, 2013).

³⁰Francois Gautier, "Lavasa: What is all the fuss about?" *Daily News & Analysis*, April 5, 2012. Available at http://www.dnaindia.com/analysis/column_lavasa-what-is-all-the-fuss-about_1671724 (Last accessed on September 19, 2013). (The recent case of Lavasa Hill City in Pune, Maharashtra, India, has given rise to various environmental issues. Lavasa is situated in the Western Ghats (a region of great biodiversity) and some activists contend that it will have an adverse impact on the biodiversity).

³¹ Kudankulam Atomic Power Project is a nuclear power station under construction in Koodankulam in the Tirunelveli district of the southern Indian state of Tamil Nadu. Construction has been delayed due to anti-nuclear protests by the locals and "People's Movement against Nuclear Energy." The Government is backing the nuclear energy but the anti-nuclear activists are citing, inter alia, dangers inherent with nuclear power plants and the lack of safety measures in case of nuclear disaster. Available at <http://www.indiaenvironmentportal.org.in/search/site/kudankulam>. (Last accessed on September 20, 2013). Also see, Legal Correspondent, "Judge: We Can Stop Work on Kudankulam if Safety is Not Ensured," *The Hindu*, September 27, 2012. Available at <http://www.thehindu.com/news/states/tamil-nadu/judge-we-can-stop-work-on-kudankulam-if-safety-is-not-ensured/article3942238.ece> (Last accessed on September 27, 2013).

individuals and organizations. Litigation is also very time-consuming. Cases in the courts can drag on for for many years before being settled.³² In addition to these problems, lies perhaps an even more serious one. Litigation engenders adversarial³³ relationship. Such relationships often occur even if the disputants have reached settlement through the court order. But the most citable reason is the fact that environmental harm done is an irreversible process. That means the environment cannot be put to its earlier pristine state in case it has been irreversibly harmed. Take for example, a court order asking the tribal group to stop cutting trees in a forest. This decision, even though pro-environment, may well cause irreversible harm to the surrounding ecology, in case the group further persists in their activities in absence of any effective supervisory mechanism which could ensure the implementation of the court order in that inaccessible forested area. Thus, traditional adversarial or win-lose mode of justice has inherent adverse consequences for environment. What is needed is to create a win-win situation for all the stakeholders. And mediation here does provide a great opportunity for crafting a win-win solution for the given environmental dispute. Given these problems with litigation, there has been increasing interest in resolving environmental disputes through mediation in a number of countries. Further, mediation is also considered promising in the resolution of transnational disputes such as the regulation of interstate water supplies, the trade in genetically modified organisms, or the regulation of greenhouse gases.³⁴

³² For example, delays borne out of complicated rules of procedure.

³³ If one describes something as 'adversarial', it means that it involves two or more people or organization who are opposing each other or are fighting with each other. Legal systems of the world are mostly based on this adversarial philosophy.

³⁴ Nancy Oretskin and Ann MacNaughton. 2002. "Is Mediation a Better Alternative for the Resolution of International Environmental Disputes?" In *Environmental Dispute Resolution: An Anthology of Practical Solutions*, edited by Ann MacNaughton and Jay Martin, 107. Chicago: American Bar

III. The Use of Mediation to Address Uncertainty Involved in Environmental Disputes

Scientific and technical complexity and uncertainty is probably the most significant factor that distinguishes environmental disputes from other kinds of conflicts. Most decisions on whether and how resources should be used impact a wide diversity of people at the local, regional, and national level. These decisions also have inter-generational and global impacts that are beginning to be taken into account. Large or small, when environmental controversies arise, advocates, policy makers, and adjudicators look to science and technical experts to inform their decisions. Scientists can provide information about the short and long term impacts of a proposed project (e.g., impact of logging on surrounding area, construction of dam in an area said to be seismically unstable). Technical experts can offer advice on whether a proposed industrial development (e.g., design of a power plant) will function in compliance with existing environmental regulations and adapt to new regulations over time.³⁵

Association. (It was noted by the authors that in many transnational environmental disputes, first, it can be difficult to determine which international treaty or convention to apply and therefore which dispute resolution mechanism to use; in mediation, the parties do not have to fit their dispute into one provision or another from any number of applicable treaties. Second, many treaties have formal structures of dispute resolution like arbitration that constrain the potential resolutions to a conflict; in mediation, the parties have more leeway to explore creative resolutions to their dispute. Third, conflicts between states involve issues of both public and private significance that engage stakeholders with opposing points of view grounded in different cultures and value systems; mediators with cross-cultural expertise can help disputants shift through these differences and help people resolve their disputes without damaging relationships. Finally, parties may use mediation before a conflict escalates into a formal dispute; mediators can help people identify stakeholders affected by potential decisions and create early solutions to prospective problems).

³⁵Peter Adler. 2002. *Managing Scientific and Technical Information in Environmental Cases: Principles and Practices for Mediators and Facilitators*. U.S. Institute for Environmental Conflict Resolution, 52-55.

Litigation poses problems for judges who often lack the economic, technical, and scientific training to fully understand the complexities of an environmental suit, particularly when the parties themselves are unable to fully understand the complexities of their dispute. Judges must rely on the parties to help them understand these complexities, but, in doing so, they may erroneously rely too heavily on one party's explanation of those scientific and technical complexities. Given this limited knowledge base, they must spend considerable public resources (including staff time in the case of judges) to develop sufficient knowledge prior to rendering an equitable decision. This may result in loss of precious court time.

One significant benefit of mediation compared to litigation is that in mediation disputants do not have to educate a court or jury about the complex, scientific and technical issues that define their dispute. Instead, parties can hire a mediator with expertise in the relevant area of dispute. Mediators can also hire other experts to help them understand the scientific and technical underpinnings of the dispute, which can be particularly useful where the subject of a dispute requires detailed knowledge of an agency's regulations. On a related note, sometimes parties do not need a mediator to understand the technical and scientific data presented to them; all they need is a facilitator whose real job is to just keep the parties talking till a constructive dialogue emerges.

Further, courts have particular difficulty in handling too many parties and their varying interests. Mediation, being flexible, can be effectively put to use to address the numerosity of parties and their agendas. Mediators can hold roundtable conversations with small segments of the parties to gain a sense for areas where people share common ground. Mediation can help parties sort through their complexity in a way that a judge could hardly do.

Many commentators have stressed that courts lack the time, facilities, and trained personnel to navigate the complex

net of issues different parties bring to court, their conflicting interests, and the voluminous number of comments that circulate around multiparty cases. Moreover, procedural principles on standing, jurisdiction, subject matter, number of parties, time limitation, and remedies often artificially narrow the scope of the dispute in court, which may make the dispute easier to resolve in the immediate term, but does not necessarily create sustainable solutions for all parties over the long-term.

IV. Revisiting Snoqualmie River Mediation Case³⁶

This case has had important implications in the development of environmental mediation. This was the first instance wherein the mediation was used over an environmental dispute. The Snoqualmie River Valley in the Seattle area of Washington, USA, was prone to heavy flooding. Farmers and other residents wanted protection through the building of a dam on the main portion of the Snoqualmie River. Some years before, such a dam had been proposed by the US Army Corps of Engineers. However, a coalition of environmental and citizen groups was concerned over the pristine wilderness of the Snoqualmie River, and opposed any form of a dam. The Governor had twice vetoed a dam on environmental grounds. But he finally recognised the need for some form of flood protection.

Mediators were called in. One of their first tasks was to identify the parties that had a stake in the outcome. Then they selected ten individuals who they thought best represented the various constituencies. The mediators brought them together. Over several months, many rounds of discussion followed that were aimed to help the participants understand their opponents' views. For instance, environmentalists came to realise that the farmers wanted to keep their land, and not sell it to developers. Farmers realised that environmentalists were

³⁶ *Supra* at 10, 11.

concerned not just with pristine wilderness, but urban sprawl. Similarly, residents began to understand that uncontrolled growth would lead to the very degradation of the area they so valued. Thus both farmers and residents began to acquiesce to land use controls which restricted the use of farm land to agriculture and prohibited development. In turn, environmentalists began to understand that while they might be able to delay any dam for a prolonged period of time, any future flooding which resulted in serious economic loss or physical injury could lead (a) lead to a full scale dam project and not merely on a portion of the river, and (b) damage their credibility in advocating future environmental positions. Thus environmentalists began to agree to consider some form of a dam. The bottom line was that consensus was reached to build a dam on a smaller portion of the Snoqualmie River. The farmers and residents gave up on full flood control protection, but they got some; the state got some hydroelectric power; environmentalists got concessions on land use and development, and they protected the main portion of the Snoqualmie. The dispute thus ended. It is seen that although the original conflict arose over the single issue of dam construction, the communication required in bargaining helped change the shape of the conflict. The negotiation changed from a yes/no dam issue into a search for environmentally acceptable flood control measures. Both dam proponents and opponents moved beyond their original misconceptions of the other side and dealt with each other's real needs and concerns.³⁷

Based on such results, one can begin to see why mediation, in comparison to litigation, can save money and time, and create partnerships rather than adversaries. Mediation can also provide a large measure of self-determination among all the constituents, and thus leads to long-term resolutions of environmental disputes.

³⁷ *Supra* at 10, p. 77.

V. Environment Mediation in India

Environmental disputes in India are all pervasive. They are potentially threatening not only to the environment but also to the region's peace and security. The court is invariably involved over environmental cases. The parties fight it out in the court in the hope of getting their positions affirmed through judgment. In many of such disputes, the government or its agencies/departments are involved. They are at dispute with a fairly large number of environmental NGO's, tribal groups, civic organizations etc. Many a time Central Government is at loggerhead with state(s). Further, states too are involved against each other in making competing claims. The court root for settling environmental disputes has not only been costly affair but the justice itself has up till now proved elusive. Notable environmental disputes which have remained highly contentious and legally contestable are, Narmada Dam Construction,³⁸ Tehri Dam,³⁹ and more recently, Lower Subansiri Hydropower Project,⁴⁰ Lavasa Township,⁴¹ Koodankulum Nuclear Power Plant⁴² etc. They have all caused enough controversies. All these cases exhibit plenty of claims and counter-claims on the part of disputing groups. Here two recent cases are considered for understanding the role of mediation in the arena of environmental disputes in India.

(A) Lower Subansiri Hydropower Project Controversy-

The Subansiri Lower Dam, officially named Lower Subansiri Hydroelectric Power Project (LSHEP), is an under construction gravity dam on the Subansiri River in North-Eastern India on the border of Assam and Arunachal Pradesh. It is meant for generating power and pushing the development in the

³⁸ *Supra* at 26.

³⁹ *Supra* at 27.

⁴⁰ *Supra* at 28.

⁴¹ *Supra* at 29.

⁴² *Supra* at 30.

surrounding area. But the opponents which include environmentalists and local tribal groups and residents are fiercely opposed to this dam. According to them, adverse environmental impacts unique to very large dams will result from completion of the Subansiri Project, both upstream and downstream of the dam site. These impacts will include ecosystem damage and loss of land along with displacement of local inhabitants.⁴³ There have been spate of violent protests against the project. Government has remained at loggerhead with the opposing groups. Currently the situation is one of deadlock with the dam construction remaining blocked.

(B) Koodankulam Nuclear Power Plant Controversy- It is located in Tirunelveli district of the state of Tamil Nadu. It has been in international news very recently with thousands of protesters belonging to the vicinity of the plant, have used various means to protest against the plant fearing a Fukushima like disaster.⁴⁴ The government too is adamant that it would go ahead with the project without any question of de-commissioning it. According to it, the nuclear energy is highly required for addressing power-needs of the country. A Public Interest Litigation (PIL) has also been filed against the government's civil nuclear programme⁴⁵ at the Supreme Court. The PIL specifically asks for the "staying of all proposed nuclear power plants till satisfactory safety measures and cost-

⁴³ Ranjit Dutta and Sarada Kanta Sarma. 2012. "Lower Subansiri Hydroelectric Power Project and Future of the Subansiri River Ecosystem." *Annals of Biological Research*. Available at <http://scholarsresearchlibrary.com/ABR-vol3-iss6/ABR-2012-3-6-2953-2957.pdf>. (Last accessed on September 25, 2013).

⁴⁴ Following a major earthquake, a 15-metre tsunami disabled the power supply and cooling of three Fukushima Nuclear Reactors in Japan, causing a nuclear accident on March 11, 2011. Available at (http://www.world-nuclear.org/info/fukushima_accident_inf129.html)

⁴⁵ "PIL against Kudankulam Project September." *The Hindu*, September 17, 2012. Available at <http://www.thehindu.com/news/national/article3908175.ece>.

benefit analyses are completed by independent agencies".⁴⁶

From the facts of the above two cases, it seems highly unlikely that a resolution acceptable to all the stakeholders could be found out through the court judgment. Only a protracted legal battle, as has been the in several environmental disputes, seems inevitable. Court judgment on such critical issues, if delivered, will only establish the stated position of either of the parties, which will be acceptable to just one group. Other group against whom the judgment is passed will remain antagonistic to the implementation of judgment. What is needed is to initiate dialogue between the competing parties. This could have been made easily possible had the law of the land provided for mediation as a first step to dispute settlement before resorting to the litigation. What is missing is the psychological preparedness⁴⁷ of the potential and actual disputants to think of mediation as an alternative means of amicable, harmonious justice. The mind-set of disputants is so obsessed with court room battle that it does not give even a slight thought on the idea of mediation or negotiation.

Further, there are too many technical, scientific issues involved in such developmental projects having potential adverse environmental fallout. How mediation could generate a middle path acceptable to all cannot be predicted here. Mediation may be successful or unsuccessful. The successful mediation in *Snoqualmie River Case* does not mean that success could be replicated in all environmental cases in all settings. That is a valid argument, but having said this, it does not also mean that mediation should not be used as a first step for generating consensus-building on a number of issues. Facilitated dialogue and negotiation may lead to establishing vital communications between the competing parties. Nowhere,

⁴⁶ *Ibid.*

⁴⁷ *Supra* at 4, p.55. (It implies persuading the minds of the potential or actual disputants to explore alternative amicable dispute resolution, and not just remaining obsessed with adversarial mode of settling disputes. Such a change in the mindset should be promoted by existing legal system and education).

it is argued that after mediation, route to litigation will be closed. It is also not argued that mediation should substitute adversarial justice system in the matter of environmental disputes. That is simply not the case. However, court battle on environmental disputes should in the first place be avoided. The need is to first try mediation before launching for litigation. In absence of mediation, the risk remains that parties will keep on holding grudges against each other even after court decision, which will over time, only grow, creating more acrimony, friction and further violations of environmental norms.

Again, In India when the court is already jam-packed with litigations⁴⁸. Public time is heavily invested in disposing of the vast arrears of cases. Where is the time left for rendering equitable environmental justice which requires the judge to acquire technical, scientific knowledge before being able to hear the parties? In such a situation Mediation can provide the answer to the complex environmental disputes.

The Idea of Special Environmental Courts

The 2010 National Green Tribunal Act,⁴⁹ crafted by the Indian Parliament has created Special Green Courts for dealing exclusively with the environmental cases. This indeed is a novel step pointing to the emerging green consciousness in the country. However, the said Act does not even mention mediation as an alternative means for dealing with the environmental disputes. This is even more surprising when environmental mediation is fast picking up in several countries

⁴⁸ It is estimated that more than 30 million cases are pending in Indian Courts.

⁴⁹An Act to provide for the establishment of a National Green Tribunal for the effective and expeditious disposal of cases relating to environmental protection and conservation of forests and other natural resources including enforcement of any legal right relating to environment and giving relief and compensation for damages to persons and property and for matters connected therewith or incidental thereto.

of the world. The demand here is not to substitute court system with mediation, rather to supplement the former by the latter. This could have been easily done by inserting a provision for environmental mediation before going for the protracted litigation in an adversarial fashion. If this was done, then it would have sent out a clear psychological message to the prospective disputants about 'first' exploring mediation for their dispute. But sadly, such a provision is conspicuous by its absence in the newly enacted law.

VI. Conclusion

Conflict over environmental and natural resource management issues can be severe and volatile. When managed well, conflict can bring people together to discuss their differences, understand the facts that underlie a dispute, and develop innovative responses to their problems. When managed poorly, conflict can consume massive quantities of time and money, destroy valuable relationships, block important projects, and escalate into physical aggression. In this connection, the role of mediation has assumed a great significance in the settlement of environmental conflicts. Over the past three decades, environmental mediation has been steadily on the rise in USA, Canada, European Union and in few other countries, and evidence suggests the practice is gaining in popularity. Mediation for international disputes has been gainfully employed for long. The process is nowadays used extensively in other areas of conflicts like, family, civil, labour, property, commercial, contract etc. However, the significance of mediation in environmental disputes has remained largely unexplored and undermined in the Indian context. The culture and practice of mediation has not yet taken firm roots in the resolution of environmental disputes in India. There is now a widely felt need to promote and encourage environmental mediation in a country like India which has, of late, seen

several environmental disputes. The Mantra must be “to meditate first and litigate not till it is really required”.