MEDIATION IN ENVIRONMENTAL DISPUTES

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ABSTRACT

Mediation is one of the different forms of ADR that is alternative dispute resolution. It is a consensual form of dispute resolution mechanism which generally falls outside the purview of the judicial dispute resolution system. It is generally employed only in settling the disputes which are private in nature. The paper is aimed to look firstly at the question that can the mediation as an alternative dispute resolution mechanism be successfully employed in resolving the disputes concerning environment and secondly if the answer to this question is in affirmative then what are the limitations on its use as an alternative environmental dispute resolution mechanism. Thirdly what are the advantages and possible disadvantages of resorting to mediation as an alternative dispute resolution mechanism in environmental cases?

Keywords: Environment, Mediation, Alternative Dispute Resolution method etc.
MEDIATION: A MECHANISM FOR ENVIRONMENTAL DISPUTE RESOLUTION

INTRODUCTION

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It appears *prima facie* that the environmental dispute on the one hand and the consensual dispute resolution mechanism as mediation appears to be the two conflicting and contradictory ends and hard to reconcile. But the case is quite different from what it appears to be. There are different instances of employment of mediation in environmental disputes, in India and across the world.

But before entering into the details of this subject as aforementioned it is important to clarify the meanings and importance of the terminologies used in the paper.

MEDIATION

The term mediation implies that it is “an informal dispute settlement process run by a trained third party, called a mediator. Mediation is intended to bring two parties together to clear up misunderstandings, find out concerns, and reach a resolution and the process is voluntary.”² The process of mediation has some basic characteristics distinguishing it from the other ADR processes.

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THE BASIC FEATURES OF MEDIATION PROCESS

The basic features of mediation are as follows:

- The mediation process is Voluntary that is the parties can enter into a contract to settle a dispute through mediation.

- If as a result of the successful mediation process any agreement is reached between the parties then the settlement so reached is enforceable as a contract.

- In the mediation the party-selected to perform the task of mediator is a neutral third party thus avoiding any kind by biasness cropping up during the course of the mediation procedures. The presence of neutral third party provides for the possible objective stand of the mediator.

- Since the mediation process is not bound by the strict rules of evidence there can be an unbounded presentation of evidence and all time consuming technicalities can be done away with.

- The mediation process seeks a mutually acceptable agreement in the form of the final settlement though coming in existence of the final mutually acceptable agreement depends mainly upon the performance of and the stand taken during mediation by the disputing parties.

- The mediation procedure is very useful for settling the disputes which are private in nature. This implies that the mediation being the private mechanism can well be confidential.

These are the basic characteristics of the mediation procedure. From the definition and characteristics though it appears that the mediation procedure is useful in resolving the private party disputes amicably but still the use of mediation in the public disputes is resorted at.3

The term ‘environmental disputes’ includes the disputes which are commonly concerned about air, water, animal species, waste management and also developmental issues. These also involves their ambit the different visions, different philosophies about the correct use of the environment, etc. Thus the environmental disputes are tensions, disagreements, debates, contests, conflicts or fights over some element of natural environment.

CHARACTERISTICS OF ENVIRONMENTAL DISPUTES

There are some specific characteristics of environmental disputes these include:

- It involves the preservation of environment versus development. It is difficult for the domestic governments to find solutions for the environmental problems because government is often a party to them.
- It involves the primary step of indentifying the stake holders (persons concerned) in a given environmental problem.
- The environmental disputes are characterized not only by the multiplicity involved in them but also the complex nature of the dispute. The complexity crops up because of the fact that any environmental issue has its direct influence on the other factors. For example the dispute concerning the air pollution has its impact on the developmental aspect of human life as the sources of air pollution includes the industries for manufacture, production of different things material for human development, transport services, etc. This follows that the isolation of any environmental dispute is difficult.
- It also involves the problem of groups fighting for environmental issues many times are not cohesive. This non-cohesiveness may be a result of the question of leadership among the groups and also the fragmentation of groups. The lack of leadership among the divergent groups fighting for various causes results in other allied problems following the confusion and divergent expectations of each of them as who should be involved in the decision making process, etc.
Environmental disputes are marked by an inability to make precise or even general determination of costs, parties and boundaries. There is no consensus on how to value environmental benefits or losses.

Conflicting claims of public interests is yet another issue involved. This is so because different groups interested in environmental claim to represent public interest on different grounds. Since the pattern of government, that is democratic pattern, has created an obligation on the state to respect the interest of everybody, following this it becomes really difficult to reconcile such different interests.

Implementation of environmental agreements is often out of the hand of the private parties to the agreements. So if the Government has to take the responsibility for implementation of the agreements Government approval is required for settlement.

In the environmental disputes there are multiple parties involved. The diversity of such parties forms yet another issue of concern while dealing with the environmental disputes.

Different appraisal of the same situations by diverse parties involved in the dispute also is a special feature of such disputes.

The another important factor which characterizes the environmental disputes is the level of the parties to the dispute the term level indicates here the different levels of power and different forms of power.

The diversity among the parties also implies a lack of relationship among the parties to the same dispute and in some cases the history of problematic relationship makes the problem worse.

Unequal level of knowledge and also the expertise in the required field also aids in the further worsening the problem. This also can be reflected in the negotiations following from the different levels of skills in support of negotiation or extended negotiations.\textsuperscript{4}

These are all the basic features of the environmental disputes and these features so enlisted above, helps in clearly pointing out as to what is the nature of the environmental dispute and also as to what constitutes the possible impediments in the process of settlement of environmental disputes. Following this discussion it can be concluded that mediation cannot be an appropriate

procedure for the settlement of environmental disputes, but the discussions in following parts of the paper focuses on the other aspect of the issue concluding that mediation can serve as an alternative method for environmental dispute resolution.

ADVANTAGES OF MEDIATION

There are some basic advantages of mediation which makes the use of this process highly preferable to the other dispute resolution processes. The advantages of the process are as follows:

1. Mediation is much less costly than civil litigation for many reasons as mediators are specialized in the field and so is aware of the intricacies of the dispute, preparation for mediation is far easier and simpler than for arbitration or litigation, attorneys are not necessary but may participate at the request of a party. The mediation can be held at the residence involved rather than needing a neutral location or at a court of jurisdiction. Generally the mediator is well-versed in the issues that are in dispute and can assist the parties in the reality of their opinions and positions. There is no court filing fees and other related expenses.

2. Mediation is a much faster process than civil litigation.

3. In mediation, the parties are full participants and can express their own opinions and concerns, where in civil litigation the parties’ attorneys are the only ones who represent their party unless the party “takes the stand” and is subject to cross-examination by the opposing attorney.

4. Mediation provides the opportunity for parties to work together and reach a settlement rather than rendering an unfriendly end to the relations.

5. Mediation is an informal procedure.

6. In mediation, both parties have the opportunity to check the background and experience of the mediator unless the mediator is specified in the dispute resolution section of their contract.
7. Mediation is a private process and not subject to public knowledge and possible media attention and so confidential.

8. If there is a full settlement or if certain items are settled and an agreement is written, that agreement is enforceable in court, if necessary, and there will generally be no appeals process. In civil litigation, there are several levels of appeals available in the continuing judicial process.\(^5\)

**MEDIATION PROCESS AS ENVIRONMENTAL DISPUTE RESOLUTION MECHANISM**

Public mediations, including environmental mediations, are typically high stake negotiations. Their consensus outcomes often become public policy that will impact millions of people or redirect very large sums of money.\(^6\) As mentioned earlier mediation allows more direct involvement of those most affected by the decisions than do most administrative and legislative processes. Also mediation produces result more rapidly and at lower cost than the judicial system and it is adaptable to the given need or situation.\(^7\) Mediation can accommodate multi party disputes, and it is ideal for addressing border causes of social conflict.\(^8\)

In many environmental disputes, mediation techniques are being used. Environmental and other public sector mediators tend to practice activist mediation, which operates differently from traditional stance of neutrality and the responsibility of the mediator.\(^9\)

In general environmental mediation seems to be a hybrid of public participation methods.\(^10\) John Harrison noted the difference between mediation and public participation:


\(^7\) See Lawrence Susskind And Connie Ozawa, Mediated Negotiation in public sector, 27, Am. Behavioral Scientist, 1983, at 255, 256


\(^9\) Environmental and public sector mediators are often in the activist camp. See, Joseph B. Stulberg, The theory and Practice of Mediation: A Reply to Professor Susskind, 6 Vt. L. Rev., 1981 at 85
Mediation is a technique of dispute resolution; if an interest group does not have sufficient power to put itself in dispute with others there may be little reason to include it in the process unless it holds the key to resolution. Public participation in contrast, is open to all irrespective of their power or whether they are in dispute, but it does not have the character of negotiation.\textsuperscript{11}

The environmental disputes are different from the other private disputes by its primary focus on land, air, water and living resources.\textsuperscript{12} There have been identified different characteristics of environmental disputes.\textsuperscript{13} These characteristics mainly point out to the fact that natural and human systems are interconnected in complex ways. Since the lack of knowledge as to complete interdependence of all factors constituting symbiotic systems and also about their operation, the consequences of use of different factors cannot be fully predicated. They also brings to the notice that environmental impacts affects multiple parties, such parties may include private citizens, business, industries, government agencies, elected officials and NGOs. These groups vary in ideological, structural, technological, organizational perspectives and also in capacities. And also the characteristics highlights the boundary issues as legislative, administrative, national, state, regional, and local boundaries.

It is also to be noted here that not all disputes concerning the environment be put before the mediator to be solved through the mediation. There have been identified different criteria that can be applied in determining which disputes can be mediated. John Harrison identified five conclusions:\textsuperscript{14}

1. Only a minority of environmental disputes is suitable for mediation: Philip Harter reviewed sixty case studies and found only six that were negotiable.\textsuperscript{15}

\begin{thebibliography}{9}
\bibitem{11} John Harrison, Environmental Mediation: The Ethical and Constitutional Dimension, 9 J. Envtl. L., 1997, at 91
\bibitem{13} These characteristics are enlisted in the earlier part of the paper which explains about the terms used in the paper.
\bibitem{14} John Harrison, Environmental Mediation: The Ethical and Constitutional Dimension, 9 J. Envtl. L., 1997, at 83
\bibitem{15} See Philip J. Harter, Negotiating Regulations: A Cure for Malaise, 71 Geo. L. J. 1, 1982
\end{thebibliography}
2. There must be some element of interdependence between the parties. Parties must perceive themselves as needing something that the other parties can offer, e.g., environmental resources, time or certainty of outcome.

3. There must be universal participation among all affected parties. Full participation in the mediation process greatly improves the chances of successful resolution and implementation.

4. The timing must be right. Mediators agree that a dispute must be ripe for negotiation, but ripeness is an elusive quality and may occur early or late in a dispute.

5. The dispute must be appropriate. As mentioned earlier, disputes that involve a clash of fundamental values or moral absolutes are among the least tractable.

As per the DEC model\textsuperscript{16}, mediation has a place in many environmental matters, including:

1. Enforcement of environmental programs.
2. Negotiation of contentious conditions.
3. Allocation of resources or pollutants.
5. Contract disputes.
6. Regulatory rule development.

Other conditions which must be met before mediation takes place include:

1. There must be legitimate representation of the constituencies affected by the disputed issues.\textsuperscript{17}

2. There must be relative power parity between the parties.


\textsuperscript{17} Bruce C. Glavovic, Training and Educating Environmental Mediators: Lessons from Experience in the US, 14, Mediation Q., 1997, at 269, 271
3. There is not a negative bargaining zone. In other words, there must be potential for a mutually beneficial settlement.

4. The issues are clearly defined.\(^{18}\)

Looking at the case of India it is clear that mediation is less formal method of dispute resolution and is not expressly recognized by Indian law. However, mediation is not disallowed; in environmental disputes, mediation is a very powerful tool due to its informal nature and the mediators' ability to facilitate a settlement.

In spite of all these said and explained it is to be noted here that, it is not an easy task to initiate mediation proceedings in environmental matters. The DEC itself is clear on the fact that “many mediated settlements take place in the context of environmental enforcement. These disputes often readily lend themselves to an assisted negotiation because they may involve limited parties, may need negotiation of remedial activities and the amount of payable penalty.”\(^{19}\)

**STEPS INVOLVED IN THE ENVIRONMENTAL MEDIATION**

There are different steps which are involved in the process of mediation. The steps include:

**Initiation Mediation:** This is the Primary step; it is in form of a preparatory nature. This aims at setting the ground for actually entering into mediation. This step includes the consensus building to refer the dispute for the mediation. Appointment of mediator after the decision to refer the matter for mediation is the next step involved at this stage.

**Mediators Identifying Stakeholders:** The mediator/s so appointed in the preparatory stage has to move with the fundamental issue of identifying the stakeholders or the parties which have interest in the dispute. As stated above environmental disputes are multiparty and also complex in nature so identifying the proper parties is an important aspect of the mediation process. In order to reach a stable settlement it is important to engage all relevant parties to the dispute in the

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mediation process. And since the environmental disputes are wider in their impacts it is important to properly identify the stakeholders.

**Bringing All The Stakeholders To The Mediation Table:** The next stage is bring in consensus among the stakeholders and asking them to take part in the mediation process so as to have a comprehensive dispute hearing and to reach at the settlement which is acceptable to all.

The other steps include Evolving rules to regulate mediation, Facilitating stakeholders to make their statements or state their problems this aims at following and fulfilling the requirements of principles of natural justice. After the problems are put forth expressly by each and every stakeholder it is important to allow them to make their claims as to the settlement and solution to the disputed matter before them. This step can be termed as ‘Allowing stakeholders to make their claims’. After getting all the stakeholders to the mediation table the role of mediator commences. The mediator/s is expected to facilitate the brainstorming discussions, group discussions or all for caucuses wherever required. The parties and stakeholders are expected to, for the successful settlement of dispute/s, have to **infuse problem solving strategy** which involves identifying the problem objectively and putting forward various possible may be innovative solutions to the problem.

The final stage is of settlement, if the mediation resulted in the parties reaching at the successful settlement then in that case the mediator is expected to sign the settlement agreement reached by the stakeholders and finally submit the settlement to the concerned authority or government if necessary.

**WHAT MEDIATORS SHOULD KEEP IN MIND?**

There are certain basic points concerning to the very essence of the mediation procedure which a mediator has to bear in mind. These include the following:

1. Involving all stakeholders as far as possible

2. Setting clear agenda
3. Neutrality – only concerned about the solution to the problem

4. Confidentiality

5. Mediator as face saver or ego absorber

6. Principles of fairness and equity

These Points so stated are like the soul of the mediation procedure breach of any one of them may lead to failure of the mediation proceedings and also the desired result cannot be achieved.

The role of mediator is facilitative one s/he is not expected to propose settlement during the course of mediation proceedings. The draft Mediation Rules\textsuperscript{20} of 2003 in its Rule 15 envisages the role of mediator in the following terms:

‘The mediator shall attempt to facilitate voluntary resolution of the dispute by the parties, and communicate the view of each party to the other, assist them in identifying issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise and generating options in an attempt to solve the dispute, emphasizing that it is the responsibility of the parties to take decision which effect them; he shall not impose any terms of settlement on the parties.’

THE OTHER ASPECT OF THE ISSUE:

After taking into consideration the advantages of the mediation as discussed in the earlier part of the paper it is relevant now to look at the other aspect of the mediation in environmental disputes. Though mediation has proved a successful means of environmental dispute resolution in America, there are a number of problems associated with the same. The reasons for the same may be understood from the following statement: "The successful application of environmental mediation and consensus-building techniques is limited by two factors - the intractable nature of many environmental conflicts and the fact that the parties are unlikely to voluntarily agree to a settlement that offers them less than might be obtained by pursuing their interests in legal,

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\textsuperscript{20} The draft Alternative Dispute Resolution and mediation rules, 2003 are the rules framed in India which are divided in two parts. The first part consisting of the procedure to be followed by the parties and the Court in the matter of choosing the particular method of ADR and the second part consists of draft rules of mediation under section 89(2)(d) of the Code of Civil Procedure, 1908.
political, or other arenas.”

The main limitations to mediated or negotiated settlements, according to Burgess and Burgess, are (a) intractable conflicts and (b) the availability of Better Alternatives To Negotiated Agreements (BATNAs) in the form of power contests. They further point out that win-win situations do not exist in environmental conflicts.

At the same time, mediation is a good choice and is perhaps the most successful in cases where the following conditions exist:

1. It is highly desirable to maintain existing relationships between the parties to continue in a professional or cooperative atmosphere,
2. No BATNAs exist,
3. Transactional costs are at a premium,
4. The parties are sufficiently equipped and able to understand the substantive issues,
5. "The parties wish to maintain control over the outcome of the process and the nature of the dispute does not interfere with government's preference to prosecute for deterrent value, explore novel issues of fact or law or make a policy statement." Even as pointed out earlier not all the dispute concerning environment can be referred to or be settled through mediation process. Thus the foregoing discussion indicates that though the mediation in environmental disputes may serve as an important mechanism to resolve them and also has highly been appreciated with the advantages of its own but on the other hand has major limitations of its application.

CASES RELATING TO THE MEDIATION IN ENVIRONMENTAL DISPUTE

1. Mt. Hood National Forest Collaborative Planning


22 An euphemism for litigation.

23 For a detailed explanation of this theory, see Guy Burgess, Ph.D. and Heidi Burgess., Ph.D, Environmental Mediation: Beyond The Limits Applying Dispute Resolution Principles To Intractable Environmental Conflicts, http://www.colorado.edu/conflict/fullJext search/AllCRCDocs/94-50.htm

The Dispute

Mt. Hood National Forest covers 1.1 million acres in Northwestern Oregon, USA. The forest has more than six million visitors per year, and serves as an urban recreation zone for residents who live within a two-hour drive of the Forest. The Forest experienced conflict over balancing appropriate uses of land. A primary concern was that the construction and year round operation of overnight ski and lodging accommodations would cause irreparable damage to the wetlands, streams, and fragile alpine meadows in the vicinity. Furthermore, the proposed expansion into the White River drainage was viewed as being inconsistent with the classification of the White River as a wild and scenic river. Other issues included balancing use of land by hikers, bikers, picnickers, campers, etc. with the need to conserve the environment.

The Process

Together with public and private sector leaders, forest leadership worked to plan for recreation management in and around the Forest. The Forest Service enlisted the help of the U.S. Institute for Environmental Conflict Resolution and the state of Oregon’s Public Policy Dispute Resolution Program to conduct an assessment of stakeholder thoughts, interests, and concerns. Together, they arrived at a foundation for the strategic planning process to build a collaborative approach to recreational uses of the Forest.

The Result

The strategic plan identified a range of design option for developing the approach to recreational uses of the Forest. These included outreach to stakeholder groups and development of the internal staff to encourage collaboration. In one case, the mediators developed a series of training workshops for Forest Service staff and potential program partners. These are ongoing initiatives. The Forest Service was able to learn about collaboration and determine goals for long-lasting positive progress through its mediator partners\(^{25}\).


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2. Washington Navy Yard Stormwater Permit Mediation

The Dispute

A National Pollutant Discharge Elimination System storm water permit for the Washington D.C. USA Navy Yard was issued by the Environmental Protection Agency. As one of two parties, the U.S. Navy did not agree with the process and appealed the permit. A four year long dispute arose.

The Process

The U.S. Institute for Environmental Conflict Resolution managed to have the parties agree on a formal mediation process to settle the dispute. The mediation process only took 5 months for a settlement to be reached.

The Result

The settlement through mediation ended a four year long dispute. As a result an environmentally protective permit was agreed upon that related to the interests of both sides.  

3. Lake Michigan – USA Mediation

The Dispute

Since the beginning of the 20th century the U.S., the Federal Government has been in conflict over the use of Lake Michigan’s water. Removing too much water, critically affects the lakes in other states. This dispute led to more than four U.S. Supreme Court cases between 1920 and 1995.

The Process

In 1995, when another US Supreme Court litigation on that issue arose, the eight Great Lake states (Illinois, Michigan, Wisconsin, Indiana, Minnesota, Ohio, New York and Pennsylvania) and the U.S. government entered into mediation. They decided to split the cost thereof. In less than one year, the parties produced a framework to permanently settle the dispute.

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The Result

The agreement, in the form of a memorandum of understanding, signed by all eight states, was announced on October 9, 1996. Illinois agreed to several limitations. One limitation was compliance with earlier court decrees limiting its use of water. If Illinois makes clear progress in meeting its obligations and an independent panel accepts the lakefront measuring system, the parties are to ask the U.S. Supreme Court to incorporate their agreement in a final decree.  

CONCLUSION

In conclusion it can be said that though India does not have any provision for employing the mediation as an alternative dispute resolution mechanism in resolving environmental disputes it can be said that if employed in India it can serve as a better alternative to the cumbersome and delayed court proceedings. It would also be useful, though in the limited sphere of its coverage, to reduce the burden on courts and resolve the disputes in very innovative way. For this the need is to widely interpret the existing Environmental legislations in India, which nowhere has expressly disallowed the use of mediation as an environmental dispute settlement mechanism. But while doing this the caution must be taken as to minimize the impact of the factors such as power difference among the parties etc. which in a way serve as obstacles in the effective dispute resolution through mediation as an alternative mechanism.