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# ALTERNATE DISPUTE RESOLUTION IN ENVIRONMENTAL DISPUTES IN INDIA: LEARNING FROM INTERNATIONAL EXPERIENCE

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## ABSTRACT

India holds the dubious distinction of having the highest number of environmental conflicts in the world. India's experience shows that is a fallacy to characterize environmental conflicts as misunderstandings arising from "miscommunication, misinformation or scientific disagreements". The conflict is almost always one of environmental interests against economic and development interests. In this regard, resolving such disputes through the means of Alternative Dispute Resolution (ADR) offers several advantages since the process increases efficiency, encourages constructive approaches, and gives a sense of ownership to the stakeholders. ADR also offers an alternative from expensive and long- winding litigation. By establishing a compromise where each side receives some of what it wants, an effective environmental dispute settlement is one that divides the difference between equally valid interests. This is why, as was also recognized by 129th Report of the Law Commission of India as well, ADR techniques such as mediation, facilitation, arbitration, and negotiation are ideal for resolution of environmental conflicts.

## INTRODUCTION

As per the Environmental Justice Atlas, an international repository of environmental disputes, India holds the dubious distinction of having the highest number of environmental conflicts in

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the world- 344 at the last count.[2] A cursory look at the cases would reveal a continuing pattern- flagrant abuse of Environmental Impact Assessment (EIA) norms, state machinery acting hand in glove with crony capitalists and use of brutal police force to quell protests whenever locals dissent against the befoulment of natural resources that sustain them.

When victims of such environmental conflicts approach the courts, they find the process to be cumbersome, expensive, and time-consuming. A recent example is the Cauvery Water Dispute which has been going on since 1982. Moreover, the outcome more often than not ends up favouring the authority undertaking the development project. For instance, in the *Konkan Railway*[3] case, the petitioners had argued that the proposed projects would likely cause degradation of agricultural land, deterioration of the mangrove's ecosystem, and so on. Favouring developmental needs over ecological concerns, the court held that it is not mandatory to conduct Environmental Impact Assessments (EIAs) for laying railway lines and reasoned that, "the *petty* interest of the local area should not defeat the project in respect of which the Central Government has already spent a huge amount".[4] The decision, in this case, opened the door for laying of railway lines in ecologically sensitive areas and massively increased avoidable wildlife deaths.

Since the traditional route of litigation has failed to stem the rising incidence of environmental disputes in India, there is a need to explore other means of conflict resolution such as mediation and arbitration. Alternate Dispute Resolution (ADR) offers several advantages. The presence of a neutral mediator or arbitrator usually depoliticizes the issue, and allows parties to "withdraw from the process as desired or dictate what terms or facts should or should not be discussed".[5] This was witnessed during the Indus River dispute between India and Pakistan which was mediated by the World Bank. Not only were the mediations successful, but the

[2]India, Environmental Justice Atlas <https://ejatlas.org/country/india> last accessed 28 June 2021.

[3]*Goa Foundation vs. Konkan Railways Corporation*, AIR 1992 Bom. 471.

[4]ibid 477.

[5]Natalie Klein, 'Settlement of international environmental law disputes', in D. Ong, et al (eds), *Research Handbook on International Environmental Law* (Edward Elgar Publishing 2010), 384.

outcome, the Indus Water Treaty, has stood the test of time and prevented any major geopolitical tensions over water.

Since procedures like mediation rely on direct communication, it reduces any risk of miscommunication or fractures developing between parties as often tends to happen in litigation.[6] It also allows vulnerable communities to have a voice in the management of their natural resources and enables the representatives of the polluting conglomerate or government to interact with members of the affected population, thereby making the process more participative and democratic. This is consistent with Principle 10 of the Rio Declaration which states that,

"Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have… the opportunity to participate in decision-making processes".[7]

Similarly, Nobel- prize-winning economist ElinorOstrom's eight rules of managing the commons, participatory decision-making, and having means of conflict resolution that are *informal, cheap, and straightforward* are essential to maintain healthy ecosystems and practicing sustainable development. Thus, this paper attempts to discuss the feasibility of adopting ADR as a means to resolve environmental disputes in India by reviewing international practice in this domain and concludes by providing suggestions on how India can realistically develop institutionalized ADR mechanisms for environmental disputes.

## USE OF ADR IN INTERNATIONAL ENVIRONMENTAL LAW

Author Yona Shamir has defined ADR as "a general term, used to define a set of approaches and techniques aimed at resolving disputes in a non-confrontational way. It covers a broad spectrum of approaches, from party-to-party engagement in negotiations as the most direct way to reach a mutually accepted resolution, to arbitration and adjudication at the other end, where an external party imposes a solution. Somewhere along the axis of ADR approaches between these two

[6]DhruvShekhar, 'Mediation for Environmental Disputes in India' (*Kluwer Mediation Blog*, 23 August 2013) <http://mediationblog.kluwerarbitration.com/2017/08/23/mediation-environmental-disputes-india/> accessed 28 June 2021.

[7]Rio Declaration on Environment and Development 1992, Principle 10.

extremes lies "mediation," a process by which a third party aids the disputants to reach a mutually agreed solution."[8]

The first case of environmental degradation to have been resolved through non-judicial means was the Trail Smelter arbitration[9], involving transboundary pollution between Canada and the US. A smelter owned and operated by the Consolidated Mining and Smelting Company in the town of Trail, British Columbia had caused severe damage to the crops and forest lands in the vicinity and the neighboring American state of Washington. After several years of contentious legal developments, the case was sent to an *ad hoc* arbitration tribunal established jointly by Canada and the US. The decision of the tribunal is often remembered as a landmark because it established the principle of transboundary harm and effectively heralded the era of international environmental law.[10] However, it was also significant for other reasons. The process of arbitration allowed the affected farmers to have a greater degree of control over the procedure. As a result, on the insistence of the farmers, the tribunal took a detour from assessing the case based on previously- established common law principles of the right to enjoy one's property and instead focused on analyzing scientific evidence to examine the extent of pollution caused by the smelter smoke. This legitimized a science-based decision-making approach that became the bedrock of the prevention principle.[11]

Today, international environmental law provides several avenues for dispute resolution through arbitration, mediation, or conciliation. Parties can approach the Permanent Court of Arbitration for instance. Several treaties refer to ADR procedures in case a country does not adequately comply with the provisions. The Vienna Convention for the Protection of the Ozone Layer, the parent of the Montreal Protocol, provides negotiation, mediation by a third party, or settlement

[8]Yona Shamir, 'Alternative dispute resolution approaches and their application' (2003) Technical documents in hydrology: PC-CP series <https://unesdoc.unesco.org/ark:/48223/pf0000133287> accessed 28 June 2021.

[9]The Trail Smelter Arbitration Case (United States Vs Canada) 1941, U.N. Rep. Int'l Arb. Awards 1905 (1949).

[10]Allum JR, "'An Outcrop of Hell': History, Environment, and the Politics of the Trail Smelter Dispute" in Rebecca M Bratspies and Russell A. Miller (eds), Transboundary Harm in International Law: Lessons from the Trail Smelter Arbitration (Cambridge University Press 2006).

[11]Peel, J., 'Precaution: A Matter of Principle, Approach or Process?' (2004) 5 Melbourne Journal of International Law 483.

by a conciliation commission as options. The UN Convention for the Law of the Sea also lists numerous arbitral tribunals among other avenues such as approaching the International Court of Justice.

***China***

In China, which, quite like India, has witnessed horrific pollution levels in the last 20 years due to development activities, mediation is a popular means of resolving environmental disputes. Up to 75% of environmental cases have been settled through two main forms of mediation: people's mediation and administrative mediation.[12] The former is largely used in cases involving misuse of shared community resources while the latter is employed to resolve disputes between government authorities and citizens by having the relevant environment protection agency supervise and manage the mediation process.[13]

***USA***

In the US, the use of ADR is widely prevalent in cases involving water conflicts. There are administrative regulations that allow parties to use non-binding mediation and arbitration.[14] Since water is a limited resource and the government has an interest in protecting it, even when the dispute is among private parties, the Environment Protection Agency (EPA) reviews the private parties' settlement agreement, and the ADR results are made public.[15] Furthermore, the Dispute Resolution Act of 1996 gives federal agencies the power to implement "ADR programs such as mediation, arbitration, mini-trials, partnering, and negotiated

[12]Yang Chunping, "The Application of ADR in Different Areas in China: Consumer Protection, the Labor Disputes, Environmental Problems and Family Disputes" (2011) 2 Opinio Juris in Comparatione<https://ssrn.com/abstract=1973737> accessed 28 June 2021, p 6.

[13]Id.

[14]Washington Dept. of Ecology, *Streamlining the Water Rights General Adjudication Procedures*, 2002 Report to the Legislature, Pub. No. 02-11-019 (2002).

[15]Kyle Fields, 'A Survey of Alternative Dispute Resolution in Water Rights Disputes' (December 3, 2013) <https://ssrn.com/abstract=2439332> accessed 28 June 2021.

rulemaking" for common disputes.[16]Pursuant to this, the EPA created the Conflict Prevention and Resolution Center (CPRC) to manage and oversee ADR in environmental conflicts.[17] It is not mandatory to participate in the CPRC program and the decision to use ADR is entirely dependent on the EPA's discretion.[18] The EPA also allows different geographical regions to adopt their own regional ADR programs.[19] One such program was created in the New England region in 1992. Although it offers several ADR options, it mainly focuses on mediation and has disposed of more than 300 cases to date.[20]

***South Africa***

South Africa is the 30th driest country in the world and has large tracts of forests that have deteriorated due to a long history of mining and deforestation, has emerged as a leader in environmental conservation and climate action in the last few decades. Section 34 of South Africa's Constitution provides "the right to have disputes resolved by means of a public hearing before a court, alternatively, where appropriate, by means of an independent, impartial forum".[21] The National Environmental Management Act, 1998 (NEMA), which is South Africa's primary law on environmental protection, lists four ADR procedures that can be availed in case a dispute arises under the Act: conciliation/mediation[22], arbitration[23] and investigation[24].[25] Section 18, which pertains to conciliation mandates that either the parties should mutually decide on a

[16]Id. At 11.

[17]Id.

[18]Id.

[19]Id.

[20]Id.;Regional ADR Program <http://www.epa.gov/region1/enforcement/adr/program.html> accessed 20 June 2021.

[21]SitheOdwaNgombane, 'Alternative Dispute Resolution: A Mechanism for Resolving Environmental Disputes in South Africa' (Thesis, University of the Free State 2016).

[22]Section 18 and 17 of NEMA.

[23]Section 19 of NEMA.

[24]Section 20 of NEMA.

[25]Ngombane (n 20) p 24.

conciliator or the Director General will appoint a person who has "adequate experience in or knowledge of the conciliation of environmental disputes" to find an amicable solution.[26] Moreover, the conciliator must take into account the principle that "environmental management must place people and their needs at the center and those conflicts must be resolved harmoniously", as has been enshrined in Section 2 of NEMA.[27]

Section 17 of NEMA enjoins any Minister or Municipal Council official to "refer a difference or disagreement concerning the exercise of any of its functions, which may significantly affect the environment to conciliation".[28] South Africa's courts have also consistently advocated for the adoption of ADR in environmental cases, as seen from the landmark case of *Space Securitization (Pty) Ltd v. Trans Caledon Tunnel Authority and Others*[29]. However, despite the generally positive attitude that South African environmental jurisprudence and NEMA have towards non-judicial means of dispute resolution, several authors have pointed out shortcomings that need to be corrected. Among other things, not only does NEMA not specify when the parties should refer their dispute to ADR, but citizens do not have any option to challenge the orders of any Minister or Municipal Council Official through ADR. As mentioned previously, only the Minister or the official can unilaterally refer a difference or disagreement regarding a decision of theirs that may affect the environment, to conciliation.

## PROSPECTS FOR INTRODUCING ADR IN INDIA IN ENVIRONMENTAL DISPUTES

In 2001, the Kentucky India Project attempted to set up exclusive mediation centers to resolve disputes related to water resources, although it was largely unsuccessful because mediation had yet not fully evolved in India.[30] Twenty years later, the practice of mediation and arbitration has

[26]Id.

[27]Id.

[28]Section 17, NEMA; Id.

[29]*Space Securitisation (Pty) Ltd v Trans Caledon Tunnel Authority and Others* 2013 4 All SA 624 (GSJ).

[30]Shekhar (n 5).

grown exponentially, especially in commercial and family disputes. As shown above, there is also a wealth of international experience to learn from.

The Indian government must act as an enabler and push for the proliferation of ADR methods, especially mediation, in an environment- related disputes by creating provisions in the Environment Impact Assessment (EIA) Notification 2006 and the Environmental Protection Act, 1986 that allow recourse to ADR similar to the provisions present in The Family Courts Act, 1984 and the Legal Services Authority Act, 1985. This will be especially helpful in alleviating environmental conflicts in rural and tribal areas which have been defined in The Fifth Schedule under Article 244(1) of the Constitution of India. Despite having constitutional protections, these areas are often at the receiving end of coercive, corporate-backed- state action, which is directed towards either forcing them to renounce the title to their land or displacing the population without adequate compensation or rehabilitation.

Indians are no strangers to practices like mediation. Even though the concept of mediation evolved in the latter half of the twentieth century, the roots of mediation can be traced back to the ancient Indian legal systems known as "Gram Panchayats" and "Nyaya Panchayats" that were popular and widely prevalent in ancient rural India and are still present in large parts of the country.[31] The Supreme Court in the case of Vedanta- Niyamgiri hills dispute where Vedanta's plans of mining bauxite at the Niyamgiri hills in Orissa were bitterly opposed by the Dongriakondh, highlighted the importance of the democratic functions that the Gram Sabha provides with access to justice, protection of human rights and obtaining "free, prior and informed consent" in land and environmental disputes.

The Gram Sabha meetings "are held within the villages of the affected communities, in places they can easily reach, which are familiar and where most faces are known to them. The Gram Sabhas are (also) empowered by the laws of India. They are deeply embedded in local institutions, although they have been underused in many states. Fourth, when constituted

[31]Arjun Pal, The Impact of Mediation in India (April 30, 2017) <https://ssrn.com/abstract=3494060> accessed 28 June, 2021.

properly, they are transparent processes which are open to scrutiny."[32] Thus, much like the process of people's mediation and administrative mediation in China, India must take advantage of the widely prevalent institution of the Gram Sabha and develop statutory mechanisms to collaborate and provide access in rural and tribal areas to services such as mediation and arbitration in environment and land-related disputes. However, this must be done cautiously because, over the last few decades, confidence in Gram Sabhas has dwindled considerably because the arbitrary and often violent and majoritarian manner of dispensing justice has become commonplace.

The 129th Report of the Law Commission of India identified certain measures that the government can take to facilitate the speedy disposal of cases through mediation. Out of all the recommendations of the Commission, the following are relevant to environmental disputes:

"Establishing a Nagar Nyayalaya with a professional Judge and two lay Judges in the same manner as the Gram Nyayalaya and having comparable powers, authority, jurisdiction, and procedure. However, the Nagar Nyayalaya will resort to mediation first and then initiate proceedings (only if mediation fails); Setting up a neighbourhood (environmental) Justice Centre involving people in the vicinity of the premises in the resolution of a dispute; and building a conciliation court system, presently working in Himachal Pradesh."[33]

Having a separate environmental Justice Centre might seem redundant considering the National Green Tribunal (NGT) already exists for that very purpose. However, the environment Justice Centre can be included as a district/regional ADR program of the NGT in the same manner that the EPA has regional programs in the US. The Centre's services could be availed for interest-based negotiations by several groups in urban areas that regularly face environmental problems but are left with limited options for redressal due to the cost of litigation. For example, Resident's Welfare Associations seek to mediate with municipal authorities on issues such as

[32]Dr Shelley Marshall and Dr Samantha Balaton-Chrimes, 'Tribal Claims Against the Vedanta Bauxite Mine in Niyamgiri, India' (2016) Non- Judicial Redress Mechanism Report Series 9 <https://www.oecdwatch.org/wp-content/uploads/sites/8/2017/05/Tribal-claims-against-the-Vedanta-Bauxite-Mine-in-Niyamgiri-India.pdf> accessed 28 June 2021, p 42.

[33]Urban Litigation Mediation as Alternative to Adjudication, One Hundred and Twenty Ninth Report, Law Commission of India, 1988.

polluting waste incinerators or illegal dumping of pollutants in a city's water bodies. If any party is dissatisfied with the outcome of the mediation or arbitration, they can be allowed to appeal to the relevant courts on grounds such as "illegality, irrationality and procedural impropriety"[34] which were originally developed for judicial review of EIA decisions. This would also further the cause of the 11th UN Sustainable Development Goal that envisages the creation of cities and human settlements that are *inclusive, safe, resilient and sustainable.*

It is important to note that it is a fallacy to characterize environmental conflicts as misunderstandings arising from "miscommunication, misinformation or scientific disagreements".[35] The conflict is almost always one of environmental interests against economic and development interests. "An appropriate environmental dispute resolution is seen as the one that splits the difference between equally valid interests by achieving a compromise in which each side gets some of what it wants".[36] This is why ADR techniques such as mediation, facilitation, arbitration, and negotiation are ideal for resolution of environmental disputes. The process increases efficiency, encourages constructive approaches, and gives a sense of ownership to the stakeholders.

[34]Sterlite Industries (India) Ltd. v. Union of India 2013 AIR SCW 3231.

[35]M. van der Bank and C.M. van der Bank, 'Settling Environmental Disputes using Alternative Dispute Resolution strategies and the impact on tourism activity in South Africa' (2017) 6 (3) African Journal of Hospitality, Tourism and Leisure <http://www.ajhtl.com/uploads/7/1/6/3/7163688/article_3_vol_6_3__2017.pdf> accessed 28 June 2021, p 5.

[36]Id.